TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 339

THE FARMERS AND MERCHANTS INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK DOBNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED [illegible], 1915

(16,511)

21010

(18,312.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 189.

THE FARMERS' AND MERCHANTS' INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK DOBNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Caption	2	1
Petition	2	1
Policy of insurance	2	1
Return of summons	7	4
Answer	7	5
Judgment of county court	9	6
Undertaking on appeal from county court	9	6
Fee bill	10	6
Judge's certificate (county court)	10	7
Order as to pleadings	11	7
Refiled petition	11	7
Policy of insurance	11	7
Answer	16	10
Reply	17	11
Jury called and case heard	18	12
Verdict	18	12
Instruction by the court of its own motion	19	13
Defendant's requests to charge	21	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1902.

	Original.	Print
Motion for new trial	22	15
Supplemental motion for new trial	24	16
Order denying new trial	24	16
Judgment	24	17
Clerk's certificate	25	17
Bill of exceptions	26	17
Judge's certificate to bill of exceptions	26	18
Testimony of George A. McCutchan	28	19
Frank Hanel	29	20
Frank Dobney	30	20
Plaintiff rests	37	25
Testimony of W. H. England	37	25
C. K. Huntington	38	26
Defendant rests	42	29
Testimony of Frank Dobney in rebuttal	42	29
Plaintiff rests	43	29
Motion to direct verdict for defendant	43	30
Motion to reopen	44	30
Testimony of Frank Dobney	44	30
Plaintiff rests	46	31
Further offer by defendant	46	31
Defendant rests	46	31
Insurance policy	47	32
Defendant's Exhibit "2"—Motion to direct verdict for defendant	52	36
Plaintiff's Exhibit "B"—Letter, Huntington to Dobney, 9, 10, 1893	52	36
Defendant's Exhibit "One"—Note of Dobney and endorsement	53	37
Stenographer's certificate	53	37
Clerk's certificates	54	38
Petition in error	56	38
Præcipe for summons in error	58	40
Summons in error	60	40
Sheriff's return	60	40
Judgment	63	41
Opinion	65	41
Clerk's certificate	75	47
Assignment of errors	76	48
Petition for writ of error	78	50
Bond on writ of error	79	50
Citation and service	80	51
Writ of error	81	52
Clerk's return to writ of error	82	53

1 Pleas before the supreme court of the State of Nebraska, at the January, A. D. 1901, term of said court, begun and held in the city of Lincoln, in said State, on the first day of January, 1901, and on a day therein, to wit, the 19th day of June, 1901.

Present: Honorable T. L. Norval, chief justice, and Honorables J. J. Sullivan and Silas A. Holcomb, judges.

Be it remembered, that on the 10th day of February, 1898, a transcript and bill of exceptions from the district court of Holt county, Nebraska, was filed in the office of the clerk of said supreme court, which transcript is in words and figures following, to wit:

2 THE STATE OF NEBRASKA, }
Holt County. }

Pleas before the district court of Holt county, Nebraska, at a term begun and holden in the county of Holt, on the 13th day of Nov., 1896, before M. P. Kinkaid, judge of said district court.

FRANK DABNEY, Plaintiff,
vs.
FARMERS' & MERCHANTS' INSURANCE COMPANY, Defendant. } No. 4770.

Be it remembered that heretofore, to wit:—on the 11th day of September 1896, a petition was filed in the office of the clerk of the district court of Holt county in the words and figures following, to wit:

The plaintiff complains of the defendant for that on April 26" A. D. 1892, the plaintiff was the owner of a dwelling-house (including foundation) in fee-simple located on the southwest quarter of section No. twenty-four, township No. thirty-one, range fifteen, in Holt county and State of Nebraska and said defendants on said day in consideration of and the payment at maturity of a certain promissory note dated April 26" 1892 for thirty-six dollars payable on the first day of December A. D. 1892, executed and delivered to defendant by plaintiff at its request and accepted by it as a premium, executed and delivered to the plaintiff the following policy of insurance which is in the words and figures as follows:—

No. 51793. Charter perpetual. $1,800.00.

Farmers' & Merchants' Insurance Co.,

3 Lincoln, Nebr., State Company.

Capital, $100,000. Authorized capital, $1,000,000.00.

In consideration of and the payment at maturity of a certain promissory note or obligation of even date herewith for thirty-six dollars, payable on the first day of December 1892, do insure Frank

Dabney against loss by fire and lightning to the amount of eighteen hundred dollars, only on the property below specified. $800 on dwelling-house (including foundation) all situated, except as otherwise provided on and confirmed to the premises now actually owned and occupied by the assured.

This insurance is based upon an application and note or notes if any be given of the assured filed in the office of said company and bearing every number herewith, which application and note are made a part of this policy and a warranty on the part of the assured and the said company hereby agrees to make good unto the assured or his executors all such immediate loss or damage at the time of loss not exceeding the amount, the sum or sums, insured as shall happen by fire or by lightning to the property above specified from the 26th day of April A. D. 1892 at 12 o'clock noon to the 26th day of April 1897 at 12 o'clock noon, the amount of loss or damage to be paid on proper proof.

This insurance is based on the representation contained in the assured's application of even number herewith, on file in the company's office at Lincoln, Nebraska, each and every statement of which is specifically a warranty and a part hereof, and it is agreed that if any false statements are made in said application, this policy shall be void or if the assured shall have or hereafter accept any other insurance on the above-mentioned property whether valid or not, or if the above-mentioned buildings be or become vacant or unoccupied or be used for any other purpose than that mentioned in said application without consent endorsed hereon, or if the property be or shall hereafter become mortgaged or encumbered
4 or upon commencement of foreclosure proceedings or in case any change shall take place in the title possession or interest of the assured in the above-mentioned property or if this policy shall be assigned or if the risk be increased in any manner except by the erection of additions and repairs to dwelling and of ordinary out buildings without consent endorsed hereon, then, in each and every one of the above cases this policy shall be null and void.

If a note be given for the premium on this policy or any part thereof it is mutually agreed and understood by and between the assured and this company, that in case said note or any part thereof be not paid at maturity, this policy shall be suspended, inoperative and of no force or effect so long as such note or any part thereof remains overdue and unpaid, and in case of any loss of said property either partial or total while said note or any part thereof remains overdue and unpaid, this company shall not be liable for said loss, nor shall the payment of said note, or the receiving or retention of the proceeds or any part thereof by this company render it liable for any loss occurring while said note or any part thereof remains overdue and unpaid, nor shall such payment or retention be construed to be a waiver of any condition in this policy or application, the payment of the premiums however revives this policy and reinstates the same for the remainder of this term only.

In case of sale of the property described in this policy before the maturity of said note, the said note becomes immediately due and

payable and also in the event of loss under this policy the company is authorized to deduct the amount of any note held for the premium or any part thereof from the amount of said loss. (No agent or employee of this company or any other person or persons has power or authority to waive or alter any of the terms or conditions of this policy, except only the secretary of this company at Lincoln, and any waiver or alteration must be in writing.)

In case there shall be any other insurance on the property hereby insured whether valid or not the assured shall recover of
5 this company only such proportion of the loss as the sum hereby insured shall bear to the whole amount of insurance. The company reserves the right to cancel this policy or any part thereof by tendering to the assured the unearned premium and the assured may cancel where the premium or note or obligation given for such premium has been actually paid in cash in which case the company shall deduct the actual compensation of the agent or solicitor for securing the issue of said policy, and also deduct the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed. In case of loss or damage the assured shall forthwith give notice of said loss in writing to the company and shall within sixty days render on oath to the company at its office in Lincoln, Nebraska, a particular account of such loss setting forth the time, cause and circumstances of the casualty, itemizing in detail the property damaged or destroyed and the amount of loss or damage under each item. The assured shall if required submit to an examination, under oath by any person appointed by the company and subscribed to such examination when reduced to writing any difference arising under this policy in case of loss may be settled by arbitration, each party to select one arbitrator and the two chosen in case of disagreement to select a third and their word in writing shall be binding as to the amount of loss only.

If this policy is made payable in case of loss to a third party or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of property covered, consented to as required by the conditions of this policy.

No suit or action against this company shall be sustainable in any court of law or chancery until an award has been obtained by arbitration as heretofore provided, fixing the amount of loss.

In witness whereof the said Farmers' & Merchants' Insurance Co. has caused these presents to be signed by its president, counter-
6 signed and attested by its sec'y and corporate seal hereto attached this 26th day of April A. D. 1892, in the city of Lincoln, Lancaster Co., Nebraska, this policy is made and accepted upon the above express conditions.

Countersigned and attested.

D. E. THOMPSON, *President.*

[SEAL.] S. J. ALEXANDER, *Sec't'y.*

2. The plaintiff further alleges that on the 14th day of March 1896 said dwelling-house so insured was burned and wholly destroyed by fire, and that said fire did not originate by any act, design or procurement on the part of the plaintiff.

3. On the 16th day of March 1896 plaintiff gave defendant due notice of the said loss in writing, at its office in Lincoln, Nebr., as required by said contract of insurance, and on the 18th day of April 1896 made, subscribed and sent a sworn statement and proof of said loss to defendant at its office in Lincoln, Nebr., and had duly performed on his part all the conditions of said policy of insurance.

4. Said building was worth when destroyed the sum of $1200 and on the 18th day of April 1896 plaintiff demanded of said def't the payment of said insurance.

5. No part thereof has been paid and there is now due from the defendant to the plaintiff on said policy of insurance the sum of $800 with interest thereon from the 14th day of March 1896, at the legal rate per cent. per annum.

Wherefore plaintiff prays for judgment against the defendant for the sum of $800 with interest thereon from March 14th, 1896 at the legal rate of interest for a reasonable amount and sum as attorney's fees in this suit, for costs and for such other relief as may be just and equitable.

FRANK DABNEY,
By his attorney, W. E. SCOTT.

7 THE STATE OF NEBRASKA, } ss:
Holt County, }

Frank Dobney plaintiff above named being first duly sworn on oath states, I have heard read the foregoing petition and know its contents and I believe it to be true.

FRANK DOBNEY.

Sworn and subscribed to before me this 25th day of May 1896.
[SEAL.] W. E. SCOTT,
Notary Public.

My commission expires Feb. 4th, 1896.

May 27th 1896 issued summons returnable July 6th, 1896 and delivered to Ed. McBride, constable.

Return.

STATE OF NEBRASKA, } ss:
Holt County, }

Received this summons the 27th day of May A. D. 1896, I certify that on the same day of May A. D. 1896, I served the within writ of summons on the within-named Farmers' & Merchants' Insurance Company by delivering to their agent B. Gillespie at O'Neill, Holt Co., Nebraska, a true and certified copy of the same, with all the endorsements thereon.

ED. McBRIDE, *Constable.*

July 3rd, 1896, defendant filed the following answer,

In the County Court of Holt County, Nebraska.

FRANK DOBNEY, Plaintiff,
vs.
FARMERS' & MERCHANTS' INSURANCE COMPANY, Defendant. } Answer.

8 For answer to plaintiff's petition herein defendant says:

1. It admits the issuing of its policy and the giving by plaintiff of his promissory note, mentioned in said petition.

2. It denies the allegations of paragraph two of said petition.

3. It admits that plaintiff made proof of loss, and denies the other allegations of paragraph three thereof.

4. It denies the allegation of paragraph four thereof.

5. It admits that no part of the alleged loss is paid and denies the remainder of paragraph five of said petition.

6. For further defense it says that the note given for the premium to be paid this defendant upon said policy, contained the following stipulation: "It is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note or any part thereof shall be overdue and unpaid," and that at the time of the alleged fire the said note was past due and was unpaid and still remains unpaid, and by reason thereof and of the terms of said policy the said policy was suspended and no liability attached to this defendant thereunder.

FARMERS' & MERCHANTS' INSURANCE CO.,
By W. H. ENGLAND AND JOSEPH WURZBURG,
Its Attorney."

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Joseph Wurzburg being sworn says defendant is a corporation and he is its attorney, that he has read the foregoing answer and knows the contents thereof and that he believes the allegations thereof to be true.

JOSEPH WURZBURG.

Subscribed and sworn to before me July 1st, 1896.
J. K. HONEYWELL,
[SEAL.] *Notary Public.*

9 July 6, 1896.—By agreement of both parties this cause set for trial August 25th, 1896, 10 o'clock a. m.

August 25th, 1896, 10 o'clock a. m.—Plaintiff appeared in person represented by W. E. Scott his attorney, the defendant represented by W. H. England, its attorney. The plaintiff filed reply to defendant's answer. This cause coming on further to be heard on the

petition answer of the defendant and its evidence and a jury being waived was submitted to court, on consideration whereof the court finds upon the issue joined between the parties in favor of the defendant.

It is therefore considered by the court that said action be dismissed and that the defendant go hence without day and recover from the plaintiff its costs herein expended taxed at $8.15.

G. A. McCUTCHAN,
County Judge.

In County Court, Before —— ——, within and for the County of Holt and State of Nebraska.

FRANK DOBNEY, Plaintiff,
vs.
THE FARMERS' & MERCHANTS' INSURANCE Co., Defendant. } Appeal Undertaking.

Whereas, on the 25th day of August 1896, the said defendant obtained a judgment against the said plaintiff before the said county court for eight $\frac{50}{100}$ dollars, and dismissed at the plaintiff's costs, and the said plaintiff intends to appeal from said judgment to the district court of the — held within and for the county of Holt and State of Nebraska.

Now, therefore, we Frank Dobney and Frank Hanel of the county of Holt aforesaid, do hereby, pursuant to the statute in such case made and provided, promise and undertake to the adverse party, in a sum not exceeding fifty dollars, that the said appellant,

First. Will prosecute his appeal to effect and without unnecessary delay:

Second. That if judgment be adjudged against him on the appeal, he will satisfy said judgment and costs.

FRANK DOBNEY.
FRANK HANEL.

The above undertaking and the surety thereto approved this 29th day of August, 1896.

[SEAL.]

G. A. McCUTCHAN,
County Judge.

(Copy.)

Judge's Fees.

Docketing	$ .25
Summons	.50
Files	.50
Two adjournments	1.00
Affidavit	.25
Oath of witness	.30
Record	2.00

Two days	2.00
Judgment	.50
	$7.30
Constable's fees	.85
	$8.15

Paid by defendant.

THE STATE OF NEBRASKA, } ss:
Holt County, }

I, G. A. McCutchan, county judge of Holt county, Nebraska do hereby certify that the above is a true and correct copy of my docket of all the proceedings had before me in said cause.

G. A. McCUTCHAN,
County Judge.

[SEAL.]

11 Now on this 13th day of November, 1896, this cause came on to be heard and it is ordered that the petition filed in the county court stand as a petition in this court and that answer filed by defendant this day stand as an answer thereto, and that plaintiff reply by November 14th, 1896. And this cause is set down for trial on November 16, 1896.

And afterwards, to wit: on the 13th day of November, 1896, there was filed a petition in the following words and figures, to wit:—

The plaintiff complains of the defendant for that on April 26" A. D. 1892, the plaintiff was the owner of a dwelling-house (including foundation) in fee-simple located on the southwest quarter of section No. twenty-four, township No. thirty-one, range fifteen, in Holt county and State of Nebraska and said defendants on said day in consideration of and the payment at maturity of a certain promissory note dated April 26th 1892 for thirty-six dollars payable on the first day of December A. D. 1892, executed and delivered to defendant by plaintiff at its request and accepted by it as a premium, executed and delivered to the plaintiff the following policy of insurance which is in the words and figures as follows:

No. 51793. Charter perpetual. $1,800.00.

Farmers' & Merchants' Insurance Co.,

Lincoln, Neb., Stock Company.

Capital, $100,000. Authorized capital, $1,000,000.

In consideration of and the payment at maturity of a certain promissory note or obligation of even date herewith for thirty-six dollars, payable on the first day of December 1892, do insure Frank Dobney against loss by fire and lightning to the amount of eighteen hundred dollars, only on the property below specified. $800 on dwelling-house (including foundation) all situated (except as other-

wise provided) on and confined to the premises now actually owned and occupied by the assured.

12 This insurance is based upon an application and note or notes if any be given of the assured filed in the office of said company and bearing every number herewith, which application and note are made a part of this policy and a warranty on the part of the assured and the said company hereby agrees to make good unto the said assured or his executors all such immediate loss or damage at the time of loss not exceeding the amount, the sum or sums, insured as shall happen by fire or lightning to the property above specified from the 26th day of April A. D. 1892 at 12 o'clock noon to the 26th day of April 1897 at 12 o'clock noon, the amount of loss or damage to be paid on proper proof.

This insurance is based on the representation contained in the assured's application of even number herewith, on file in the company's office at Lincoln, Nebraska, each and every statement of which is specifically made a warranty and a part hereof, and it is agreed that if any false statements are made in said application, this policy shall be void or if the assured shall have or hereafter accept any other insurance on the above-mentioned property whether valid or not or if the above-mentioned buildings be or become vacant or unoccupied or be used for any other purpose than that mentioned in said application without consent endorsed hereon, or if the property be or shall hereafter become mortgaged or encumbered or upon commencement of foreclosure proceedings or in case any change shall take place in the title possession or interest of the assured in the above-mentioned property or if this policy shall be assigned or if the risk be increased in any manner except by the erection of additions and repairs to dwelling and of ordinary outbuildings without consent endorsed hereon, then, in each and every one of the above cases this policy shall be null and void.

If a note be given for the premium on this policy or any part thereof it is mutually agreed and understood by and between the assured and this company, that in case said note or any part thereof be not paid at maturity, this policy shall be suspended, inop-

13 erative and of no force or effect so long as such note or any part thereof remains overdue and unpaid, and in case of any loss of said property either partial or total while said note or any part thereof remains overdue and unpaid, this company shall not be liable for said loss, nor shall the payment of said note, or the receiving or retention of the proceeds or any part thereof by this company render it liable for any loss occurring while said note or any part thereof remains overdue and unpaid, nor shall such payment or retention be construed to be a waiver of any condition in this policy or application, the payment of the premiums however revives this policy and reinstates the same for the remainder of this term only.

(In case of sale of the property described in this policy before the maturity of said note, the said note becomes immediately due and payable and also in event of loss under this policy the company is authorized to deduct the amount of any note held for the pre-

mium or any part thereof from the amount of said loss.) No agent or employee of this company or any other person or persons has power or authority to waive or alter any of the terms or conditions of this policy, except only the secretary of this company at Lincoln, and any waiver or alteration must be in writing.

In case there shall be any other insurance on the property hereby insured whether valid or not the assured shall recover of this company only such proportion of the loss as the sum hereby insured shall bear to the whole amount of insurance. The company reserves the right to cancel this policy or any part thereof by tendering to the assured the unearned premium and the assured may cancel where the premium or note or obligation given for such premium has been actually paid in cash in which case the company shall deduct the actual compensation of the agent or solicitor for securing the issue of said policy, and also deduct the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed. In case of loss or damage the assured shall forthwith give notice of said loss in writing to the company and shall within sixty days render on oath
14 to the company at its office in Lincoln, Nebraska, a particular account of such loss sitting forth the time, cause and circumstances of the casualty, itemizing in detail the property damage or destroyed and the amount of loss or damage under each item. The assured shall if required submit to an examination, under oath by any person appointed by ths company and subscribed to such examination when reduced to writing any difference arising under this policy in case of loss may be settled by arbitration, each party to select one arbitrator and the two chosen in case of disagreement to select a third and their award in writing shall be binding as to the amount of loss only.

If this policy is made payable in case of loss to a third party or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of property covered, consented to as required by the conditions of this policy.

No suit or action against this company shall be sustainable in any court of law or chancery until an award has been obtained by arbitration as heretofore provided, fixing the amount of loss.

In witness whereof the said Farmers' & Merchants' Insurance Co. has caused these presents to be signed by its president, countersigned and attested by its secretary and corporate seal hereto attached this 26th day of April A. D. 1892, in the city of Lincoln, Lancaster Co., Nebraska, this policy is made and accepted upon the above express conditions.

D. E. THOMPSON, *President.*

[SEAL.] S. J. ALEXANDER, *Sec't'y.*

2. The plaintiff further alleges that on the 14th day of March 1896 said dwelling-house so insured was burned and wholly destroyed by fire, and that said fire did not originate by any act, design or procurement on the part of the plaintiff.

15 3. On the 16th day of March 1896 plaintiff gave defendant due notice of the said loss in writing, at its office in Lincoln, Nebr. as required by said contract of insurance, and on the 18th day of April 1896 made, subscribed and sent a sworn statement and proof of said loss to defendant at its office in Lincoln, Nebr., and had duly performed on his part all the conditions of said policy of insurance.

4. Said building was worth when destroyed the sum of $1200 and on the 18th day of April 1896 plaintiff demanded of said def't the payment of said insurance.

5. No part thereof has been paid and there is now due from the defendant to the plaintiff on said policy of insurance the sum of $800 with interest thereon from the 14th day of March 1896, at the legal rate per cent. per annum.

Wherefore plaintiff prays for judgment against the defendant for the sum of $800 with interest thereon from March 14th, 1896 at the legal rate of interest for a reasonable amount and sum as attorney's fee in this suit, for costs and for such other relief as may be just and equitable.

FRANK DOBNEY,
By his attorney, W. E. SCOTT.

THE STATE OF NEBRASKA, } ss:
Holt County, }

Frank Dobney plaintiff above, being first duly sworn on oath states, I have heard read the foregoing petition and know its contents and believe it to be true.

FRANK DOBNEY.

Sworn and subscribed to before me this 25th day of May, 1896.
[SEAL.] ——— ———.

My commission expires Feb. 4th, 1898.

And afterwards to wit: on this 13th day of November, 1896 there was filed in the office of the clerk of said court, an an-
16 swer in the words and figures as follows, to wit:—

For answer to plaintiff's petition herein defendant says:

1.

It admits the issuing of its policy and the giving by plaintiff of his promissory note, mentioned in said petition.

2.

In denies the allegations of paragraph two of said petition.

3.

It admits that plaintiff made proof of loss, and denies the other allegation of paragraph three thereof.

4.

It denies the allegations of paragraph four thereof.

5.

It admits that no part of the alleged loss is paid, and denies the remainder of paragraph five of said petition.

6.

For further defense it says that the note given for the premium to be paid this defendant upon said policy contained the following stipulation: "It is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note or any part thereof shall be overdue and unpaid" and that at the time of the alleged fire the said note was past due and was unpaid and still remains unpaid, and by reason thereof and of the terms of said policy the said policy was suspended and no liability attached to this defendant thereunder.

7.

It denies each and every allegation in said petition not herein admitted.

FARMERS' & MERCHANTS' INSURANCE COMPANY,
By W. H. ENGLAND &
JOSEPH WURZBURG, *Its Attorneys.*

17 THE STATE OF NEBRASKA, } ss.:
Lancaster County, }

Joseph Wurzburg being sworn, says, defendant is a corporation and he is its attorney; that he has read the foregoing answer and knows the contents thereof and that he believes the allegations thereof to be true.

JOSEPH WURZBURG.

Subscribed and sworn to before me November 12, 1896.
[SEAL.] J. K. HONEYWELL,
Notary Public.

And afterwards to wit: on this 13th day of November 1896, there was filed in the office of clerk of said court, a reply in the words and figures as follows to wit:

The plaintiff replying to the answer of defendant denies each and every allegation therein contained. The plaintiff further replying to said answer alleges; that the policy or contract of insurance was not an entirety but a severable one; that the dwelling-house in controversy in this case was insured separately and apart from all other property insured by the policy of suit; that long prior to the destruction of said dwelling-house by the fire mentioned in the petition the plaintiff had fully paid to the defendant the premium due for insurance upon said dwelling-house, and that at the time of said fire the premium due the defendant for insurance on said dwelling during the entire life of said policy was fully paid; that the note mentioned in the answer was executed merely as evidence of the amount

due the defendant from the plaintiff for the entire $1800.00 mentioned in the policy; and that subsequent to the execution and delivery of said note and subsequent to the maturity thereof the plaintiff paid the defendant the full amount of premium due for the
18 life of said policy on the dwelling-house in controversy, and the defendant received the same, and ever since has retained the same.

That subsequently to the maturity of said note by agreement between plaintiff and defendant the contract of insurance sued upon was severed the said dwelling-house being by said severed contract insured separately from all other property mentioned in said policy; that defendant knowingly and intentionally and by agreement received from plaintiff the full premium for said insurance on said dwelling-house for the period beginning April 26th, 1892 and ending April 26th, 1897.

W. E. SCOTT,
J. J. HARRINGTON, &
M. F. HARRINGTON,
Attorneys for Plaintiff.

Now on this 17th day of November 1896, this cause came on for hearing, came the plaintiff in person and by M. F. Harrington his attorney, came the defendant by W. H. England his attorney, came also the following-named persons as duly selected from the body of the county to wit:

George Blake, W. H. Newman, M. Welch, Dennis Alder, Jos. Gautz, J. F. Crane, B. J. Martin, W. I. Chapman, M. Zieman, T. M. Elder, W. L. Holcomb and A. B. Donaldson, who being duly empanelled and sworn, this cause came on for trial to the court and the jury with the reporter and after hearing the evidence, arguments of counsel, and charge of the court the said jury retired with a sworn bailiff for deliberation, and afterwards to wit:

On the same day said jury returned into court with their verdict in writing signed by their for-man and say:

In the District Court of Holt County, Nebraska.

FRANK DOBNEY
vs.
THE FARMERS' & MERCHANTS' INSURANCE CO. } Verdict.

19 We, the jury in this case, do find for the plaintiff Frank Dobney and we assess the amount of his damages at the sum of $800.00 with interest from date of loss to November 13, 1896 at seven per cent. amounting to $837.00 total.

BENNETT MARTIN, *Foreman.*

And afterwards to wit: on this 17th day of November 1896, there was filed in the office of clerk of said court, instructions by the court, in the words and figures as follows, to wit:

Instructions by the Court on its Own Motion.

First. The jury are instructed by the court the plaintiff Dobney sues the defendant insurance company on its policy of insurance issued to him securing him against loss by fire and lightning of his dwelling-house, two barns and some cattle, the value of said dwelling-house being fixed by said policy at $800.00.

Defendant excepts to above instruction.

W. H. ENGLAND AND
JOSEPH WURZBURG,
Defendant's Attorneys.

Second. Plaintiff alleges that on the 14th day of March 1896, said dwelling-house so insured by defendant was burned and wholly destroyed by fire without his fault. Wherefore he asks judgment for the amount of the insurance on said dwelling-house being the amount of $800.00.

Third. The defendant insurance company denies the loss of said dwelling-house by fire and for a further and independent defense to plaintiff's cause of action defendant charges that the policy of insurance sued on contains the following stipulation: "It is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note or any part thereof shall be overdue and unpaid." And defendant further alleges that at the time of the alleged fire, said note was past due and unpaid and that by reason thereof, said policy of insurance was suspended at the time of the fire, and no liability attached to the defendant insurance company thereon.

20 Fourth. Plaintiff Dobney, with reference to defendant's defense that the note given for the insurance premium has not been paid and was past due when the fire occurred, replies that previous to said fire it had been mutually agreed by and between plaintiff and defendant that the contract of insurance was severed and that the dwelling-house was insured separately, from other property mentioned in said insurance policy and that defendant by said agreement received from plaintiff full payment of the premium of insurance on said dwelling-house long prior to the loss by the fire complained of.

Fifth. The jury are instructed by the court to entitle plaintiff to recover, the burden of proof rests upon him to prove by a preponderance of all the evidence, first: His ownership of said dwelling-house, and that it was real estate, that is that it was built upon plaintiff's tree claim with the intention that it should be permanent thereon and that it was plaintiff's intention to comply with the United States laws to an extent which would entitle him to a patent from the United States to the title in fee to the said timber claim. 2½. That said dwelling-house on or about the 14th of March, 1896 was totally destroyed by fire without the fault of plaintiff.

Third. That prior to the loss of said building by fire it was mutually agreed by and between plaintiff and defendant, that the con-

tract of insurance of several kinds of property insured by said policy was severed so as to separate and sever the said dwelling-house and the insurance thereof from the other insured property and that defendant insurance company then received payment from plaintiff for the full amount of the premium for the insurance of said dwelling-house with the intention that it should be full payment for the insurance on said dwelling-house for the time it was insured.

Defendant excepts to subdivisions 1 & 3 of above paragraph.

W. H. ENGLAND &
JOSEPH WURZBURG,
For Def'ts.

21 If plaintiff has so proven and established a case then your verdict should be for the plaintiff for the sum of $800.00 with interest at 7 % thereon from the time of said loss to the 13th day of November, 1896.

If plaintiff has not so established and made out a case, or if the evidence be equally balanced on either of said propositions or preponderates in favor of defendant on either of said propositions then your verdict should be for the defendant.

Sixth. By a preponderance of the evidence is meant, evidence of greater worth, weight or value.

Seventh. Where two witnesses of equal credibility squarely contradict each other upon any material proposition in issue then unless one of such witnesses be supported by other evidence either direct or circumstantial it cannot be said there is a preponderance of evidence for either side on the issue thus involved.

M. P. KINKAID, *Judge.*

Defendant excepts to the first above instruction and to subdivisions 1 & 3 of the fifth above instruction.

W. H. ENGLAND &
JOSEPH WURZBURG,
Defendant's Attorneys.

Nov. 17th, 1896.

M. P. KINKAID, *Judge.*

And afterwards, to wit: on the same day there was filed a defendant's request to charge, as follows:

Defendant requests the court to instruct the jury as follows,

1.

If you find that the plaintiff had not paid his premium note in full at the time the loss occurred then the plaintiff cannot recover.

Refused. Defendant excepts.

M. P. KINKAID, *Judge.*

22 2.

The burden of proof to show that his premium on the house in-

surance was paid is on the plaintiff, he must prove this by a fair preponderance of the testimony.

Refused. Defendant excepts.

M. P. KINKAID, *Judge.*

3.

The plaintiff cannot recover unless he shows by proof the value of the property destroyed.

Refused. Defendant excepts.

M. P. KINKAID, *Judge.*

4.

In order to sustain his claim that the property destroyed by fire was real estate the plaintiff must prove that he owns the ground whereon it stood by a vested title.

W. H. ENGLAND &
JOSEPH WURZBURG,
Defendant's Attorneys.

Refused. Defendants except.

M. P. KINKAID, *Judge.*

Defendant excepts to the refusal of the court to give instructions within, numbered 1, 2, 3, & 4.

Dated Nov. 17th, 1896.

W. H. ENGLAND &
JOSEPH WURZBURG,
Defendant's Attorneys.

And afterwards to wit: on this 18th day of November 1896, there was filed in the office of clerk of said court, a motion for new trial in the words and figures as follows, to wit:

The defendant moves the court to set aside the verdict and judgment herein and grant it a new trial for the following reasons:

1.

The verdict is not supported by the evidence.

23

2.

The verdict is against the weight of the evidence.

3.

The judgment is contrary to law.

4.

The court erred in overruling the defendant's motion to strike the reply from the files.

5.

The court erred in permitting the trial of issues which were not raised in the trial in the county court.

6.

The court erred in overruling defendant's motion to strike out the testimony of Frank Dobney in support of the allegations of the reply.

7.

The court erred in overruling defendant's objection made to the offer of irrelevant, immaterial and incompetent testimony.

8.

The court erred in denying defendant's motion to direct a verdict for the defendant.

9.

The court erred in refusing to give instructions to the jury requested by the defendant numbered 1, 2, 3, and 4.

10.

The court erred in instructing the jury on its own motion by its instructions numbered "first" and by the 1st, and 3rd, subdivisions of instruction numbered "fifth."

11.

For errors of law occurring at the trial and excepted to by defendant.

Dated Nov. 18, 1896.

W. H. ENGLAND &
JOSEPH WURZBURG,
Defendant's Attorneys.

And afterwards to wit: on this 20th day of Nov. 1896, there
24 was filed in the office of clerk of said court a supplemental motion in the words and figures as follows, to wit:

The defendant moves the court to set aside the verdict and judgment in this cause and to grant a new trial thereof for the following reason, in addition to the reasons set out in defendant's motion for a new trial heretofore filed, to wit:

That the defendant has discovered new evidence relevant and material to the issues in said cause, of which it did not know before the trial and which with reasonable diligence it could not have discovered up to the time of said trial.

Lincoln, Nebr., Nov. 19, 1896.

W. H. ENGLAND &
JOSEPH WURZBURG,
Attorneys for Defendant.

Now on this 17th day of April, 1897, this cause came on to be heard on the motion of the defendant for a new trial herein; and said motion having been submitted to the court, it is considered and ordered by the court that said motion be and it is hereby overruled and defendant excepts.

This cause then came on to be heard on the application of plaintiff for judgment upon the verdict and for the allowance and taxation of an attorney's fee herein.

The court finds that there is due the plaintiff from the defendant as a reasonable attorney's fee in this case, the sum of $150 and it is ordered and considered by the court, that said $150 be taxed as part of the costs herein.

On the question of a judgment in this action, the court finds that the verdict herein, was for $837.00 and that the interest which has since accrued on said verdict is $24.40.

It is therefore considered by the court, that the plaintiff do have and recover from the defendant the sum of eight hundred sixty-one and $\frac{40}{100}$ dollars, together with the costs in this action taxed at $190.23.

25 *Certificate.*

THE STATE OF NEBRASKA, } ss:
County of Holt, }

I, John Skirving, clerk of the district court of Holt county, Nebraska, do hereby certify that the above and foregoing is a true copy of the transcript, petition, answer, reply, instructions of the court to the jury, defendant's request to charge, defendant's motion for a new trial, defendant's amended motion for a new trial and copies of all journal entries of the proceedings had in this court in the above-entitled cause as the same now appear of record on file in my office.

Witness my hand and the seal of said court at O'Neill, in said county and State this 12 day of July 1897.

JOHN SKIRVING,
Clerk of the District Court.

Clerk's fees for transcript $9.00.

Endorsed: 9888. Farmers' & Merchants' Ins. Co. *v.* Dobney. Transcript. Supreme court of Nebraska. Filed Feb. 10, 1898. D. A. Campbell, clerk.

26 Dist. Court, Holt Co., Nov., 1896, Term.

FRANK DOBNEY
vs.
FARMERS' & MERCHANTS' INSURANCE COMPANY.

Filed Feb. 3rd, 1897. John Skirving, clerk dist. court, Holt. Co., Nebr., by —— ——, deputy.

O'Neill, Neb., June 29, 1897.—Received this bill of exceptions for examination & amendment.

M. F. HARRINGTON,
Pl'ff's Att'y.

O'NEILL, —— —, —.

I herewith return this bill of exceptions & suggest no amendment.

M. F. HARRINGTON,
Pl'ff's Att'y.

The above and foregoing is all the evidence offered by either parties in this case and contains all the rulings of the court thereon and all motions of attorney and rulings of the court thereon and on the application of defendant is settled as a bill of exceptions and ordered to be made a part of the record in this case. This the 2nd day of July in the year of our Lord, 1897 at O'Neill, in the 15" judicial district.

M. P. KINKAID,
Presiding Judge.

27 *Index.*

Plaintiff's witnesses.

	Drt.	Crs.	Rdrt.	Rcrs.	Rcld.
Frank Hanel.....	2"3				
Frank Dobney.....	3"7	7"10			
Plaintiff rested.....					10

Defendant's witnesses.

W. H. England.....	10"11			
C. K. Huntington.....	11"14	14"15	15	
Defendant rested.....				15

Plaintiff's rebuttal.

Frank Dobney.....	16	
Plaintiff rested.....		17
Plaintiff reopens case.....		17
Frank Dobney.....	18"19	
Plaintiff rested.....		19

28 In the District Court of Holt County, Nebraska.

FRANK DOBNEY
vs.
THE FARMERS' & MERCHANTS' INSURANCE COMPANY.

Nov. 1896 term, to wit, Nov. 17, 1896.
Kinkaid, J.
M. F. and J. J. Harrington for plaintiff, England & Wurzburg for defendant.

Transcript of Testimony.

GEORGE A. MCCUTCHAN, being called as a witness on behalf of defendant, examined in chief by Mr. England, testified as follows:

Q. You are county judge of this county?
A. Yes sir.
Q. Have been for several years?
A. Yes sir.
Q. Are you the county judge who tried the case of Frank Dobney *versus* The Farmers' & Merchants' Insurance Company?

Plaintiff objects to the introduction of any testimony here until it is stated the purpose for which it is offered.

The defendant moves the court now here orally to strike the plaintiff's reply from the files because it changes the issues and raises issues which were not raised in the county court where it was first tried. The plaintiff now objects to the introduction of any evidence in support of this motion as incompetent, irrelevant and immaterial and not proper practice. The defendant suggests a diminution of the record and moves that the county judge correct his transcript so as to show the facts. To which plaintiff objects as not the proper method of practice and for the reason that the jury has been already sworn to try the issues in this case, and
29 that any motion to correct or modify the record comes too late and for the further reason that the issues in this case have been fully made up without any reference to the record in the county court.

By the COURT: The only question is whether you have gone to trial.

COUNSEL FOR DEFENDANT: We have not gone to trial, not a witness has been called.

COUNSEL FOR PLAINTIFF: The trial has begun when the jury are sworn and jeopardy has begun.

By the COURT: The order is granted and I will look up the question of jeopardy.

Opening statement for plaintiff by Mr. M. F. Harrington, and for defendant by Mr. England.

FRANK HANEL, being duly sworn on behalf of plaintiff, and examined in chief by Mr. M. F. Harrington, testified as follows:

Q. Do you know the plaintiff in this case, Frank Dobney?
A. I know the house it was all in good order, the chimney and everything,——
Q. You knew the house in which he lived did you?
A. Yes sir.
Q. In what county was that house?
A. In Holt county.
Q. What direction from Stuart?
A. Northeast.
Q. About how far?
A. About between six and seven miles.
Q. How many dwelling-houses did he have there along in April 1892?
Q. Did he have any more than that one?
A. He had three together—all one house.
Q. That was the only one he had?
A. Yes sir.
Q. Do you know what became of that house?
A. It burnt down one Saturday.
Q. When was that do you remember?

A. Defendant admits that it was burned down the 14th day of March last, 1896.
Witness excused.

FRANK DOBNEY, being called and duly sworn as a witness in his own behalf, examined in chief by Mr. Harrington, testified as follows:

Q. Did you receive a policy of insurance from the defendant company at any time?
A. Yes sir.
Q. Fire and lightning insurance?
A. Yes sir.

Paper marked Plaintiff's Exhibit "A."

Q. Is the paper marked by the reporter Plaintiff's Exhibit "A" the policy?

Defendant admits that Exhibit "A" is the policy.
Plaintiff now offers in evidence the policy, and the same is received in evidence.

Q. Do you know the dwelling-house described in the policy?
A. I think I do, yes sir.
Q. You may state whether that house stood on land to which you had title, or Government land?
A. It stood on a tree claim not proved up yet.
Q. Was the barn and other buildings therein described on the same Government land?

A. Yes sir.

Q. Now what rate per cent. premium were you to pay for this insurance?

31 Objected to as the policy is the best evidence.

Q. Now did you pay any of the premium on this policy?

A. Yes sir.

Q. What was the first payment you made?

A. Ten dollars ($10).

Q. Did you give particular instructions at that time as to how that should be applied?

A. No not at that time.

Q. Was there later?

A. Me and Mr. Huntington had some talk I think, yes sir.

Q. Now do you know the company's adjuster?

A. No sir I never met him, I met Mr. Huntington and he adjusted a loss on a steer.

Q. He adjusted your loss?

A. Yes sir.

Q. Do you know what his business has been?

A. Soliciting agent I suppose.

Q. How long have you known him as an agent of this defendant company?

A. It must have been five years I think.

Q. Was he an agent of the company at the time you got your policy?

A. Yes sir I got that policy from Mr. Hart at Atkinson.

Q. Now you had a loss under this policy once did you?

A. I had.

Q. What was it?

A. I had a steer killed by lightning.

Q. Did the company send some person to adjust that loss with you?

A. Mr. Huntington came and done it.

Q. What policies did you have on your cattle?

A. I had five hundred ($500) dollars in that company and two hundred I think in the Phœnix.

Q. Did you and Mr. Huntington have a conversation—agree on the amount that their company should pay on the loss of this

32 steer?

A. Yes sir. Seventeen dollars and eighty-six cents ($17.86).

Q. You may state what was said how that should be applied and how the ten dollars should be applied?

A. Objected to as not being the issues involved in this case as tried in the court below, and incompetent, irrelevant and immaterial. Overruled, defendant excepts.

Q. Go on and state the conversation?

A. There was some back on that note and we talked about the balance of the note and the ten dollars already paid, that left a small sum back on the note I told him to apply that seventeen dollars

and eighty-six cents—to apply that on the note. I wanted to have my house insured—anyhow he said he would write me when he got to Lincoln.

Q. What did he say about insurance on the dwelling-house, the eight hundred dollars?

A. He said it would be all right.

Q. Well, explain how it would be all right?

A. If it would be satisfactory to the company and he thought it would.

Q. Explain fully?

A. To apply the payment that was already paid, on the house, and he would write me when he got to Lincoln, and the $17.86 apply that on the note.

Q. What did he say about the premium on the house?

A. Sixteen dollars he said.

Q. Was there some interest?

A. Yes sir.

Q. Now then you had paid him ten dollars and seventeen dollars and eighty-six cents?

A. On the loss—I don't think I paid him the ten dollars, I don't know who I had paid that to.

Q. Now what was done after you had paid the premium on the dwelling-house the sixteen dollars and interest what was to be done with the balance?

A. It was to be applied on the rest of the insurance.

33 Q. Was there anything said about an extension of the balance on the barn and sheds and cattle?

A. Yes sir.

Q. What was said about that?

A. He said he would write me when he got to Lincoln.

Q. What was said about the balance?

A. I don't think anything was said about the exact time.

Q. What did you say in general about any extension of the balance?

A. Why just simply—that's all that I remember of now.

Q. Well state it again, I don't recall it.

Objected to as it is not shown that this party was competent to make the contract.

Overruled,—defendant excepts.

Q. What was said about any extension of the balance, that is, the insurance on the sheds, barn, and cattle?

A. He said he would write me when he got to Lincoln.

Q. When Huntington got to Lincoln, you may state whether he wrote you back in regard to the arrangements and talk you had with him?

A. Yes sir.

Q. Have you the letter with you?—handing witness a letter.

A. That's the letter, yes sir,—and the same is marked Plaintiff's Exhibit "B."

Plaintiff now offers the letter Exhibit "B" in evidence.
To which defendant objects.—(Giving no grounds of objection.)
Overruled,—defendant excepts.
And the same is received in evidence.

Q. You may state whether in compliance with his request
34 and this arrangement you signed the receipts for seventeen dollars and eighty-six cents and sent them right back to the company?
A. Yes sir.
Q. Did you receive any other consideration for that loss except as you have stated?
A. No sir.
Q. Did the company retain those receipts you sent them?
A. I couldn't tell you.
Q. They never sent them back to you anyway?
A. No sir.

Cross-examination.

By Mr. ENGLAND:

Q. Now Mr. Dobney you remember when this case was tried in county court I showed you this note, do you remember your testimony there, what you testified in regard to the giving of this note?
A. That was the note, yes sir.
Q. And you remember you looked at the endorsements on the back of the note?
A. Yes sir, them endorsements are all right.
Q. Now you remember you testified there that all the agreement and all there was in regard to the matter of extension was placed on the back of that note, do you remember about that? That's endorsed on here the last extension, due October first 1893, that is that that was the last extension made?
A. It was due but I didn't know where the note was.
Q. Now there was nothing said, no question raised upon any other matter regarding the question of extension of the note down there in county court?
A. There was nothing asked about it, no sir. In fact there wasn't hardly any questions asked me.
Q. You remember having testified this, you were Mr. Scott's witness down there?
A. Yes sir.
Q. You remember I asked you upon cross-examination whether there was any further or other discussion or talk in regard
35 to extension after the note was extended to the first of October?
A. I didn't ever hear anything more about that note.
Q. You remember down in the county court I asked you that question, do you remember what you answered?
A. I don't remember, no sir.
Q. You remember you said the last extension was due October first, you remember that?

A. No, sir I don't remember.

Q. Now is it not a fact Mr. Dobney that that is all there was in regard to the matter of the extension of this note—that is, you had your loss of seventeen dollars and something, and that occurred after your note was due, your note was due and you hadn't paid it?

A. I hadn't paid all of it.

Q. And you had another note of forty-eight dollars ($48) that was due upon some other property?

A. I don't know whether it was due or not.

Q. Now then is it not a fact that Mr. Huntington said he would submit to the company this, that while the company was not liable because of the fact your note was past due and unpaid that if you would agree to pay off this note on October first 1893 that he thought he could arrange to allow you to apply that stock upon that note?

A. I wouldn't say it did occur.

Q. You wouldn't say it did not occur?

A. No sir.

Q. Well as a matter of fact don't you think that's right?

A. I don't remember of any such thing happening, I don't remember any time that was said.

Q. Well do you remember this in the county court, that all there was said in regard to the extension was on the back of that note?

A. I didn't know what was on the back of the note.

Q. I showed it to you didn't I?

36 A. Not as I know of, you didn't ask me hardly any questions in the lower court.

Q. I asked you that question, don't you remember of it?

Plaintiff objects to the method of cross-examination as improper.

A. By the Court: "I think there is rather too much controversy, go ahead."

Q. I understood you to say that your talk with Mr. Huntington was provisional, that is, I mean that whatever was done he would submit it to the company and whatever they did would be agreed upon, that he did not himself—that is, this was not extended by Mr. Huntington himself as I understand it?

Objected to as incompetent, irrelevant and immaterial, and improper method of cross-examining the witness.

Overruled,—plaintiff excepts.

Q. Is that true?

A. Why that's what he wrote me that letter for.

Q. Then he didn't have anything to do with that extension himself?

Objected to as argumentative, and asking for a conclusion.

Sustained. Defendant excepts.

Counsel for Plaintiff: "Let him ask what this man said himself."

Q. Well, what did Mr. Huntington say to you in regard to the matter of submitting this to the company?

A. He just simply said he would see when he went to Lincoln and would write me, and that's what he done.

Q. Then there was no arrangement made there?

Objected to as calling for a legal conclusion.
Sustained,—defendant excepts.

A. Did Mr. Huntington pretend to give you any extension independent of the company?

Objected to as a conclusion.
Sustained,—defendant excepts.

Q. Handing witness note,—Is that your signature and the note that you gave for that policy Mr. Dobney?

37 A. That's the note I gave to Mr. Hart.

Q. For this policy that is now in controversy?

A. Yes sir.

The same is marked Defendant's Exhibit "One."
Witness excused.
Plaintiff rested.

Defendant's Case.

Defendant moves the court to strike out all the testimony of the witness Mr. Dobney in support of the reply, because it raises issues not raised in the court below and because there is no showing that Mr. Huntington was such an agent as was authorized to enter into the transactions and make the bargains and agreements testified to by the witness.
Overruled,—defendant excepts.

W. H. ENGLAND,—being duly sworn on behalf of defendant examined in chief by Mr. Wurzburg, testified as follows:

Q. Mr. England where do you live?
A. At Lincoln.
Q. What is your business?
A. I am insurance adjuster and attorney, for the insurance company.
Q. You tried this case for the defendant in the county court?
A. I did.
Q. Do you remember what took place there and what the issues were?
A. I do.
Q. You heard the testimony of Mr. Dobney?
A. I did.
Q. In that court?
A. Yes sir.
Q. You heard the testimony of Mr. Dobney here today?
A. I did.

Q. You may state what the issues were upon which this
38 case was tried in the county court?

Objected to as incompetent. Sustained. Defendant excepts.

The COURT: "I don't see that that cuts any figure here."

Witness excused.

The noon hour having arrived the court admonished the jury and took a recess until half past one o'clock p. m.

Afternoon session,—half past one o'clock p. m.
Court convened and trial proceeded as follows:

C. K. HUNTINGTON, being duly sworn on behalf of defendant, examined in chief by Mr. Wurzburg, testified as follows:

Q. Mr. Huntington what is your business?
A. Insurance agent, soliciting agent.
Q. Soliciting insurance?
A. Yes sir.
Q. What company?
A. Farmers' & Merchants' of Lincoln.
Q. How long have you been in that employment?
A. Now seven years.
Q. Do you know Mr. Dobney plaintiff?
A. I have met him.
Q. Did you have any business with him?
A. I have.
Q. What was that, in reference to a loss?
A. Yes sir.
Q. You may state when you first learned of that loss and how.
A. Through a letter written by A. T. Hart to the company at Lincoln.
Q. Well state fully.
A. I was present at Lincoln when the letter was received and the loss was turned down on account of no liability on account of the note being overdue.
39 Q. Who turned it down?
A. Mr. Alexander the secretary of the company.
Q. When did you next hear about the loss?
A. The next time I was at Atkinson.
Q. About how long afterwards?
A. Along the fore part of September.
Q. What year?
A. September 1893.
Q. You say you learned about the loss from Mr. Hart?
A. Yes sir.
Q. What did you hear from him?—By the way who was Mr. Hart?
A. Our local agent at Atkinson.
Q. Go on?

A. He wanted to know if I couldn't in some way pay Mr. Dobney for this loss, I told him Mr. Dobney was owing us considerable money that was past due that we could-'t do it, there was no liability, it brought out further conversation, he said he was afraid it would injure his business there if it couldn't be arranged in some way to pay it, I met Mr. Dobney and talked it over and told him I had no authority to pay any loss that the company didn't owe, and the proposition was made that if we would allow him this loss he would pay the company the balance due the first of October the same year, and I told him I would submit his proposition in person to the company at Lincoln and would advise him as to the result; I submitted the proposition to the company and with the understanding he would pay the company the balance due in October first the company concluded to allow him this loss which it did and extended his note to October first the same year and I so notified Mr. Dobney.

Q. Handing witness note,—Is this the Dobney note?

A. Yes sir that's the Dobney note.

Defendant offers the note Exhibit "1" in evidence.

And the same is received in evidence.

Q. Whose handwriting is this on the back of the note?

40 A. That is the writing of C. D. Mullen, the company's cashier in their office.

Q. Now you stated in answer to my question, that you told Mr. Dobney that you had no authority to pay losses on which the company was not liable, did you have authority to pay losses of any kind?

A. Not without special instructions from the company.

Q. Well that is not your business?

A. No sir.

Q. Was there anything said between you and Mr. Dobney—you may state what this endorsement refers to on that note, was that money?

A. There is one endorsement there of ten dollars that refers to money, the other refers to seventeen dollars and some cents refers to our proportion that we paid on the loss of the steer?

Q. Was that steer loss the loss you had a conversation about?

A. Yes sir.

Q. Was anything said between you and Mr. Dobney in connection with the transaction that the endorsement on the note or the amount that he was to be allowed on the loss or cash already paid on the note was to be applied toward premium insurance upon the house?

A. No sir, no such conversation took place. I never heard it until I heard him testify to it in court today.

Q. Speaking of Mr Hart, what kind of an agent was he?

A. He was a soliciting agent.

Cross-examination.

By Mr. HARRINGTON:

Q. What do you mean by soliciting agent?
A. He simply can take an application and submit it to the company.
Q. Take notes and premium money?
A. He can.
41 Q. How long have you been with this defendant insurance company?
A. About seven years.
Q. Where do you live?
A. Lincoln.
Q. That's where the company's head office is?
A. Yes sir. I am soliciting agent for the company, I solicit insurance all over the State.
Q. On salary?
A. Partly on salary and partly commission.
Q. Do you go out to investigate losses?
A. Not unless I am requested to do so.
Q. Haven't you done so?
A. No unless I am sent.
Q. Haven't you done so frequently?
A. I have, I have adjusted a few stock losses in this county.
Q. That is what the Dobney loss was?
A. Yes sir.
Q. Now when you went to Lincoln you told them all that had taken place between you and Dobney?
A. I did,
Q. And they instructed you to write the letter?
A. Yes sir.
Q. That was after a full statement of what had taken place between you and Mr. Dobney?
A. Yes sir.
Q, You collect notes for the company?
A. By special request.
Q. You have collected notes in this county?
A. I have.
Q. And you talked and did business with their local agents?
A. I do.
Q. And checked up their books?
42 A. I do sometimes by request.

Redirect by Mr. WURZBURG:

Q. Did you settle this loss with Mr. Dobney?
A. I did not.
Q. You submitted his proposition to the company?
A. I did.
Q. The company accepted it?
A. Yes sir.

Witness excused.
Defendant rested.

Defendant withdraws its rest and the witness C. K. HUNTINGTON recalled, and examined in chief by Mr. Wurzburg, testified as follows:

Q. Handing witness note—I will ask you to make a computation as to the amount that has been paid on that note and the amount remaining unpaid.

Witness computes.

Q. You may state how much was unpaid on that note at the time this fire occurred?

A. There was fifteen dollars and fifteen cents still due on the note at the time the loss occurred.

Q. I will ask you whether you reported to the insurance company any such arrangement as Mr. Dobney has testified to in this case?

A. No sir I did not, never heard of it.

Witness excused.

Defendant rested.

Plaintiff's Rebuttal.

FRANK DOBNEY, called in his own behalf in rebuttal, examined in chief by Mr. Harrington, testified as follows:

Q. Did Mr. Huntington when he came out with you to adjust that loss state that he had no authority to make settlement with you?

Objected to as assuming something that does not appear in
43 the *the* testimony.

Q. Do you remember the time when Mr. Huntington was out at your place and when you talked over your matter of the loss of this steer?

A. He didn't come to my place. I met him in Stuart.

Q. Did he at that time tell you he had no authority to settle?

A. No we went out together and got appraisers.

Q. To appraise what?

A. That steer.

Q. What did the appraisers do?

A. Appraised him at twenty-five ($25) dollars.

Q. And what was the share of the loss to be paid by the defendant? Seventeen dollars ($17)?

A. Yes sir.

Q. Who fixed the figures?

A. Mr. Huntington.

Q. Under this same appraisement?

A. Yes sir.

Defendant moves to strike out that testimony as the matter of appraisement is not in any way an admission of liability, that the appraisement was simply had for the purpose of ascertaining the amount of the loss.

Overruled. Defendant excepts.

Witness excused.

Plaintiff rests.

The court here gives the jury a recess while counsel present the law of the case and their arguments on the law, to the court.

The defendant moves the court to direct a verdict for the defendant on the ground that the issues have been changed from what they were in the county court, and on the further ground that the plaintiff has not made a case, and on the ground that the plaintiff
44 has introduced no evidence tending to show such a contract and arrangement as are set up in the plaintiff's reply. The plaintiff requests leave to amend the reply in this case by interlineation as follows: "That subsequent to the maturity of said note by agreement between plaintiff and defendant the contract of insurance sued upon was severed the said dwelling-house being by said severed contract insured separate from all other property mentioned in said policy, that defendant knowingly and intentionally and by agreement received from plaintiff the full premium for such insurance on said dwelling-house for the period beginning April 26th 1892 and ending April 26th 1897."

And the same is allowed.

The defendant here files a motion to direct a verdict for the defendant, which motion is marked Defendant's Exhibit "2."

The plaintiff requests permission to reopen the case to prove the actual value of the building at the time it was destroyed and to show the period and claim of occupancy of the real estate upon which it was situated.

And plaintiff is allowed to reopen his case.

Defendant objects to the reopening of the case except on terms, for the reason that the order of the court allowing testimony of the value of the property destroyed to be introduced can only become operative upon the amendment of the petition and a change of the plaintiff's whole action.

Plaintiff withdraws his rest to reopen the case as to value.

Plaintiff reopens his case.

FRANK DOBNEY, plaintiff, recalled in his own behalf, examined in chief by Mr. Harrington, testified as follows:

Q. Referring to this dwelling-house in controversy, who
45 built that?

A. I did.

Q. How long ago?

A. I bought the place with it on.

Q. How long did you own that place before it was burned?

Objected to as immaterial and irrelevant and in no way in issue in this case.

Overruled,—defendant excepts.

A. I bought that claim in 1889, August 14th.

Q. Who was living in that dwelling-house at the time it was burned down?

A. I was.

Q. And who was living there with you?
A. My family.
Q. And how long had you and your family lived in that house?

Objected to as incompetent, irrelevant and immaterial, and not in issue in this case.
Overruled. Defendant excepts.

A. Ever since I came to Holt county.
Q. How long ago is that?
A. Seven years ago this March coming.
Q. How was that house constructed?
A. It was a frame building, the main building was eighteen by twenty-six (18 x 26) fourteen (14) foot studding.

Objected to and move to strike out answer because it is incompetent and immaterial and not in issue in the case, and irrelevant.—Overruled. Defendant excepts.

Q. Was there a foundation or not under this dwelling-house?
A. There was a brick foundation. Yes.
Q. Now what title or claim had you to that land on which that building stood?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.
Overruled. Defendant excepts.

46 A. I have a tree claim on that.
Q. A tree-claim filing?
A. Yes sir.
Q. And how long had you been holding this as a tree claim?
A. Ever since the 14th of August, 1889. I bought the right.
Q. Have you made proof on the land as yet?
A. No sir. I can't do it until the eight years is out.
Q. That won't be up until next August?
A. No sir.

Objected to and move to strike it out as incompetent, irrelevant and immaterial, and not in issue in this case. Overruled. Defendant excepts.

Witness excused.
Plaintiff rested.

The defendant now offers testimony to show that the issues in the case, and tried in this court are different and other issues from the issues tried in the court below.
Objected to as incompetent and immaterial, and not proper practice, and because the request comes too late. Sustained. Defendant excepts.
The court now overrules defendant's motion to direct a verdict for defendant, and defendant duly excepts.
Defendant rested.

47 No. 51793. Charter perpetual. $1800. Farmers' & Merchants' Insurance Company. Lincoln, Nebraska. Stock company. Capital, $100,000. Authorized capital, $1,000,000.00 In consideration of — dollars paid, and the payment at maturity of a certain promissory note or obligation of even date herewith for thirty-six °° dollars, payable on the first day of December 1892, do insure Frank Dobney against loss or damage by fire and lightning, to the amount of eighteen hundred dollars, only on the property below specified:

$800 on dwelling-house (including foundation, cellar or basement walls).
..... on household furniture while therein.
..... on beds and bedding while therein.
..... on family wearing apparel while therein.
..... on provisions for family use while therein or in cellar or basement under dwelling.
..... on musical instruments and printed music while therein.
..... on printed books while therein.
..... on silver plate and plated ware while therein.
..... on pictures, engravings and frames, (not exceeding $10 on each and never exceeding cost price).
..... on sewing machine while therein.
$300 on barn No. 1 and shed (including foundation).
200 on barn No. 2 (including foundation)
..... on granary No. 1 (including foundation).
..... on ——.
..... on ——.
..... on reapers, mowers, harvesters, or other farming utensils while in barns, sheds or barn yards (not including threshing machines, steam-engine, nor any other machinery propelled thereby).
..... on wagons, buggies, carriages, harness, saddles, and robes, on the premises.
$..... on grain in barns, granary, cribs, dwellings, or in stacks on cultivated premises.
..... on hay in barns or stacks on cultivated lands (not on prairie or meadow).
..... on work horses and mules (not to exceed $100 on any one animal) anywhere within the State, except in livery, feed or sale stable, and against loss by lightning while on or off premises, whether in use or not.
..... on horse and mule colts and unbroken horses (not to exceed $50 on any one animal) while on the premises.
..... on cattle (not to exceed $30 on any one animal) on the premises, and against loss by lightning while on or off the premises.
..... on hogs (not to exceed $5 on any one animal) on the premises.
..... on sheep (not to exceed $3 on any one animal) on premises and against loss by lightning while in care of herder.

All situated (except as otherwise above provided) on and confined to the premises now actually owned and occupied by the assured, to wit: — acres in sec. — tp. — range — township of —— county of —— State of Nebraska, lot — block — in —— addition to the town of —— State of Nebraska. Loss, if any, payable to —— —— of —— mortgagee, as interest may appear, subject, however, to all the conditions of this policy.

$1500 total insurance permitted on cattle to be concurrent herewith only.

48 This insurance is based upon an application and note or notes, if any be given, of the assured filed in the office of said company, and bearing even number herewith, which application or note or notes are made a part of this policy, and a warranty on the part of the assured. And the said company hereby agrees to make good unto the said assured or his executors, all such immediate loss or damage at the time of loss, not exceeding in amount the sum or sums insured, as shall happen by fire or lightning, to the property above specified, from the 26th day of April one thousand eight hundred and ninety-two at 12 o'clock noon, to the 26th day of April one thousand eight hundred and ninety-seven at 12 o'clock noon; the amount of loss or damage to be paid on receipt of proper proof.

This insurance is based on the representations contained in the assured's application of even number herewith on file in the company's office in Lincoln, Nebraska, each and every statement of which is hereby specifically made a warranty and a part hereof; and it is agreed that if any false statements are made in said application, this policy shall be void, or if the assured shall have, or hereafter accept, any other insurance on the above-mentioned property, whether valid or not; or if the above-mentioned buildings be or become vacant, or unoccupied, or be used for any other purpose than that mentioned in said application, without consent endorsed hereon; or if the property be or shall hereafter become mortgaged, or encumbered; or upon commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above-mentioned property; or if this policy shall be assigned; or if the risk be increased in any manner except by the erection of additions and repairs to dwelling, and of ordinary outbuildings, without consent endorsed hereon, then, in each and every one of the above cases, this policy shall be null and void. If a note be given for the premium on this policy, or any part thereof, it is mutually agreed and understood by and between the assured and this company, that in case

49 said note, or any part thereof, be not paid at maturity, this policy shall be suspended, inoperative and of no force or effect, so long as such note, or any part thereof remains overdue and unpaid, and in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds or any part thereof, by this company, render it liable for any

loss occurring while said note or any part thereof remains overdue and unpaid, nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same for the remainder of its term only. In case of sale of the property described in this policy, before maturity of said note, the said note becomes immediately due and payable, and also in the event of loss under this policy the company is authorized to deduct the amount of any note held for the premium, or any part thereof, from the amount of such loss. No agent or employee of this company, or any other person or persons, has power or authority to waive or alter any of the terms or conditions of this policy, except only the secretary of this company at Lincoln, Nebraska, and any waiver or alteration by him must be in writing. In case there shall be any other insurance on the property hereby insured, whether valid or not, the assured shall recover of this company only such proportion of the loss as the sum hereby insured shall bear to the whole amount of insurance. The company reserves the right to cancel this policy, or any part thereof, by tendering to the assured the unearned premium; and the assured may cancel where the premium or note, or obligation, given for such premium has been actually paid in cash, in which case the company shall deduct the actual compensation of the agent or solicitor for securing the issue of said policy, and also deduct the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed. In case of loss or damage, the assured shall forthwith give notice of said loss in writing, to the company, and shall within sixty days render on oath to the company, at its office in Lincoln, Nebraska, a particular account of such loss, setting forth the time, cause, and circumstances of the casualty, itemizing in detail the property destroyed or damaged, and the amount of loss or damage under each item. The assured shall, if required, submit to an examination, or examinations, under oath, by any person appointed by the company, and subscribe to each examination when reduced to writing. Any difference arising under this policy, in case of loss, may be settled by arbitration, each party to select one arbitrator, and the two chosen, in case of disagreement, to select a third, and their award in writing shall be binding as to the amount of the loss only. If this policy is made payable in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured unless there has been an actual sale of property covered consented to as required by the conditions of this policy. No suit or action against this company shall be sustainable in any court of law or chancery until an award has been obtained by arbitration as heretofore provided fixing the amount of the loss.

In witness whereof, the said Farmers' & Merchants' Insurance Co. has caused these presents to be signed by its president, countersigned and attested by its secretary, and corporate seal hereto affixed this 26th day of April A. D. 1892, in the city of Lincoln, Lancaster

county, Nebraska, and this policy is made and accepted upon the above express conditions.

D. E. THOMPSON, *President.*

Countersigned and attested:
[SEAL.] S. J. ALEXANDER, *Secretary.*

"A"
Plaintiff's exhibit. J. J. K.

(Reverse side.)

Form 93. Read your policy. Fire policy. Farmers' & Merchants' Insurance Company, Lincoln, Nebr. Frank Dobney, Stuart, P. O., Holt county, Nebr. Amount insured,—$1800. Charged for policy, $36.00 Expires April 26th, 1897. Note due Dec. 1st. 1892. A. T. Hart, agent. In communicating with the company give the No. of your policy.

51 Risks on which this company declines to issue policies.

Furniture factories, wagon shops, carpenter and copper shops, paint shops, broom factories, frame hotels, grist and saw mills, photograph galleries, threshing machines, buildings on leased ground except school lands, unoccupied buildings, buildings containing machinery run by steam, creameries, skating rinks, ice-houses, elevators. This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by endorsement on its face. In case of actual sale and transfer of title, leave having been obtained, the form subjoined may be used, which must be executed at the time of said transfer. For value received, — hereby transfer, assign, and set over unto —— —— and assigns, all — right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom. Witness — hand and seal this — day of —— 18—.

—— ——.

Sealed and delivered in presence of

—— ——.

The Farmers' & Merchants' Insurance Company hereby consent that the interest of —— —— in the within policy be assigned to —— —— subject, nevertheless, to all the terms and conditions therein contained and referred to. Lincoln, Nebraska, —— — 18—. —— secretary. No agent or solicitor has any authority to consent to a transfer or to make endorsements of any kind on this policy.

This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by endorsement on its face. In case of actual sale and transfer of title, leave having been previously obtained, the form subjoined may be used, which must be executed at the time of said transfer. For value received, — hereby transfer, assign, and set over unto —— —— and assigns, all — right, title and interest in this policy of insurance,

and all benefit and advantage to be derived therefrom. Witness—hand and seal this — day of —— 18—.

—— ——.

Sealed and delivered in presence of

—— ——.

The Farmers' & Merchants' Insurance Company hereby consent that the interest of —— —— in the within policy be assigned to —— —— subject, nevertheless, to all the terms and conditions therein contained and referred to. Lincoln, Nebraska, —— 18—. —— —— secretary. No agent or solicitor has any authority to consent to a transfer or to make endorsements of any kind on this policy.

52 In the District Court of Holt County, Nebraska.

FRANK DOBNEY, Pl'ff,
v.
FARMERS' & MERCHANTS' INSURANCE COMPANY, Def't.

The defendant moves the court to direct a verdict for the defendant for the reasons following:

1st. The issues have been changed from what they were in the court below, as appears from the transcript and the files and records in this cause.

2nd. The evidence shows that the premium note given for the insurance sought to be recovered herein was past due and in part unpaid when the loss occurred upon which the plaintiff seeks to recover and no waiver is shown by the evidence.

3rd. The plaintiff has proved no damage nor introduced any evidence upon which the jury can base any finding or verdict of the amount due or damage.

W. H. ENGLAND,
JOSEPH WURZBURG,
Def't's Att'ys.

"2" Defendant's Exhibit J. J. K.

Endorsed: Holt Co. dist. ct. Motion to direct verdict.

D. E. Thompson, Pres't. S. J. Alexander, Sec'y.
H. J. Walsh, V. Pres't. S. H. Burnham, Treas.

Farmers' & Merchants' Insurance Company, Lincoln, Neb.

Authorized capital, $1,000,000.

LINCOLN, 9/10, 1893.

Frank Dobney.

DEAR SIR: Enclosed your policy. Everything O K. Note extended to fall due same time as last one. Kindly sign enclosed receipts both original and duplicate and return to the Co.

53 Yours, C. K. HUNTINGTON.

"B" Plaintiff's Exhibit J. J. K.

The company is authorized to insert the number of policy in this note. Sec. 24, town —, range 15, —— P. O., Holt county, Neb. $36.00. On the first day of December 1892, for value received, I promise to pay to the Farmers' and Merchants' Insurance Company or order, at their office in Lincoln, Nebraska, thirty-six no/100 dollars in payment of premium on policy No. 51793 of said company, with interest at rate of ten per cent. per annum until paid. No interest if paid when due. This note is for insurance; and in case of loss under the policy for which it is given, the company is hereby authorized to deduct the amount of the note from the amount of said loss. And it is hereby agreed, that the company shall not be liable for any loss or damage that may occur to the property insured, while this note, or any part thereof, shall be overdue and unpaid.

Dated at Farm this 26th day of Apr. 1892.

F. DOBNEY.

Witness:
A. T. HART.

"One" Defendant's Exhibit J. J. K.

Endorsed: "No. 1. No. 51793. F. Dobney. Stuart P. O. Holt county, Neb., $36.00 Due Dec. 1, 1892. Notice mailed Oct. 22, 1892. Notice mailed Dec. 9 1892. Notice mailed Jan. 18 1893. 2/1/'93 paid $10.00. Bal. ex. to Aug. 1—'93.—Notice mailed Jan. 24 1893. Notice mailed Aug. 14 1893. 9/8/'93 paid by loss 17.86. Bal. ex. to Oct. 1—'93. Notice mailed Oct. 12 1893 Notice mailed Nov. 13 1893. "One" Defendant's Exhibit J. J. K. A. T. Hart, agent."

STATE OF NEBRASKA, }
Holt County. }

I, J. J. King, do hereby certify that I am official stenographer of the fifteenth judicial district of said State, that I was present in my official capacity as such stenographer at the trial of the above and foregoing entitled case, and took in shorthand the testimony and oral proceedings had in said cause, and the foregoing is a full, true, and complete translation of, and transcript from my original shorthand notes of the record so made by me, together with all offers, admissions, objections, rulings of the court thereon, and exceptions taken or saved by the parties respectively, and all exhibits offered, marked or used on the trial of said cause.

—— ——.

54 In testimony whereof, I have hereunto set my hand, at my office in the city of O'Neill in said county, and within said 15th judicial district, this the 8th day of June, A. D. 1897.

J. J. KING,
Official Stenographer.

Fee $2.20. Paid by def't.

THE STATE OF NEBRASKA, } ss:
Holt County, }

I, John Skirving, clerk of the district court of Holt county, Nebraska, do hereby certify the above and foregoing is the bill of exceptions settled by the parties to said action and allowed by the court in the above-entitled action.

Witness my hand and the seal of said court at O'Neill Nebr., this 2nd day of July, 1897.

[SEAL.]

JOHN SKIRVING,
Clerk, D. C.,
By M. COLLINS, *Deputy.*

THE STATE OF NEBRASKA, } ss:
Holt County, }

I, John Skirving, clerk of the district court of Holt county, Nebraska, do hereby certify the above and foregoing is the bill of exceptions, settled by the parties to said action and allowed by the court in the above-entitled action.

Witness my hand and seal of said court, at O'Neill, Nebr. this 3rd day of February, A. D. 1898.

[SEAL.]

JOHN SKIRVING,
Clerk District Court.

Endorsed: 9888 Farmers' & Merchants' Insurance Co. *v.* Dobney. Bill of exceptions. Supreme court of Nebraska. Filed Feb. 10, 1898 D. A. Campbell, clerk. Supreme court, Nebr. Farmers' & Merchants' Ins. Co. *v.* Frank Dobney. Bill of exceptions. Rose & England, for pl't'ff in error.

55 And thereupon afterwards, to wit: on the tenth day of February, 1898, there was filed in the office of the clerk of said court in said case, a petition in error, which said petition in error is in the words and figures following, to wit:

56 In the Supreme Court of the State of Nebraska.

FARMERS' & MERCHANTS' INSURANCE COMPANY,
Plaintiff in Error,
vs.
FRANK DABNEY, Defendant in Error. } Petition in Error.

The plaintiff in error, Farmers' and Merchants' Insurance Company, complains of the defendant in error, Frank Dabney, for that on the 17th day of April, 1897, the defendant in error recovered a judgment against plaintiff in error in the district court of Holt county, Nebraska, for the sum of $861.40 and for an attorney'- fee of $150.00 and costs of suit in an action pending in said court wherein the defendant herein was plaintiff and the plaintiff herein was defendant, a transcript of the proceedings whereof containing the said final judgment is filed herewith.

Plaintiff in error alleges there is error in said proceedings and judgment in this:

1. The verdict and judgment therein is not sustained by sufficient evidence.

2. The verdict and judgment therein is contrary to law.

3. The court erred in overruling the defendant's motion therein to strike plaintiff's reply from the files.

4. The court erred in permitting the trial of issues which were not raised in the trial in the county court where the case originated.

5. The court erred in receiving over defendant's objection testimony of the witness Frank Dabney touching the manner in which certain payments on his premium note to defendant company should be applied.

6. The court erred in overruling the motion of defendant to strike out the testimony of witness Frank Dabney touching his conversation with one C. K. Huntington.

57 7. C. K. Huntington, with whom plaintiff claims to have made an agreement to sever the item of premium covering his house from other items in the policy sued on, was not shown to have had authority to bind the defendant with respect thereto, or to enter into such agreement.

8. The court erred in overruling defendant's motion to direct a verdict in favor of defendant.

9. The court erred in refusing to give to the jury instruction No. 1 requested by defendant.

10. The court erred in refusing to give to the jury instruction No. 2 requested by defendant.

11. The court erred in refusing to give to the jury instruction No. 3 requested by defendant.

12. The court erred in refusing to give to the jury instruction No. 4 requested by defendant.

13. The court erred in giving to the jury instruction "first" on its own motion.

14. The court erred in giving to the jury instruction "fifth" on its own motion, and in giving subdivision 1st and 3rd thereof.

15. On the pleadings and evidence defendant was entitled to a verdict in its favor as a matter of law.

16. The court erred in allowing an attorney fee to plaintiff and ordering the same to be taxed as part of the costs.

17. The taxation of an attorney fee to plaintiff was without authority of law, and the said order is invalid and operates to deprive the defendant of its property without due process of law.

18. Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney fee to be taxed, is unconstitutional and void for want of mutuality of the provisions and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the fourteenth amend-

58 ment to the Constitution of the United States, and in conflict with section 3 of article 1, and section 15 of article 3 of the constitution of Nebraska.

Plaintiff in error therefore prays that said judgment be reversed and a new trial granted in said cause and for such other and further relief as justice may require.

WELLINGTON H. ENGLAND &
HALLECK F. ROSE,
Attorneys for Defendant in Error.

The clerk of the supreme court:

Please issue summons in error in the above-stated case directed to sheriff of Holt county and deliver *to us* for service.

ROSE & ENGLAND,
For Pl'ff in Error.

Endorsed: 9888. Supreme court Nebraska. Farmers' & Merchants' Insurance Company *v.* Frank Dabney. Petition in error & precipe. Supreme court of Nebraska. Filed Feb. 10, 1898. D. A. Campbell, clerk. Rose & England for plaintiff in error.

59 And thereupon afterwards, to wit:—on the 10th day of February, 1898, a summons in error was issued in said cause, which was thereafter returned, with endorsement of service thereon, and which said summons in error and the return thereon *is* in the words and figures following, to wit:

60 *Summons in Error.*

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Holt:

You are hereby commanded to notify Frank Dabney that a petition in error has been filed in the supreme court of Nebraska by the Farmers' & Merchants' Insurance Company asking the reversal of a judgment against it rendered April 17th, 1897, in a certain cause in the district court of Holt county, wherein said Frank Dabney was plaintiff and said Farmers' & Merchants' Insurance Company was defendant and to appear before the supreme court, at the city of Lincoln, on the 20th day of September, 1898, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 20th day of September, 1898.

[SEAL.] Witness my hand and the seal of said court, at the city of Lincoln, this 10th day of February, A. D., 1898.

D. A. CAMPBELL, *Clerk*,
By —— ——, *Deputy*.

STATE OF NEBRASKA, }
Holt County, } *ss:*

I hereby certify that on the 15th day of February, 1898, I served the within writ of summons on the within-named Frank Dabney by delivering a true and certified copy thereof with all indorsements

thereon to M. F. Harrington, Esq., the attorney of record for said Frank Dabney in the original case in the district court of Holt county, mentioned in the within writ to reverse which said petition in error is prosecuted.

61 All done in the said county of Holt.

JOHN M. STEWART,
Sheriff, Holt Co. Sheriff.

Fees.

Service and return	$ .50
Copy	.25
Mileage	.10
	$ .85

(Endorsed:) General No. 9888. Supreme court, State of Nebraska. Farmers' & Merchants' Ins. Co. *v.* Frank Dabney. Summons in error. Supreme court of Nebraska Filed Feb. 17, 1898. D. A. Campbell, clerk.

62 And thereupon afterwards, to wit, on the 19th day of June, 1901, the following proceedings were had and done in said case as appear of record in the journal of said court, to wit:

63 In the Supreme Court of the State of Nebraska.

FARMERS' & MERCHANTS' INSURANCE Company, Plaintiff in Error, *v.* FRANK DABNEY, Defendant in Error. } No. 9888. Error to the District Court of Holt County. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel, on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is, therefore, considered by the court that said judgment be and the same hereby is affirmed, at the costs of the plaintiff in error, taxed at $—; and that a mandate issue accordingly.

64 And thereupon and on the 19th day of June, 1901, there was filed in the office of the clerk of said court in said case, an opinion, which said opinion is in the words and figures following, to wit:

65 FARMERS' & MERCHANTS' INSURANCE CO. *v.* DABNEY. } No. 9888.

Opinion Filed June 19, 1901.

Commissioner's opinion, department No. 1.

1. Exceptions to the exclusion of testimony are unavailing unless there be a tender made of the proof which it was sought to elicit. Union P. R. Co. *v.* Vincent, 58 Nebr., 172, followed.

2. As a general rule it is not good pleading to state a new cause of action, or part thereof, in the reply, but where no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. Gregory *v.* Karr, 36 Nebr., 533, followed.

3. Where the proofs before a jury are conflicting, the verdict will not be disturbed unless it is clearly wrong.

4. Evidence examined and held to present a proper question for the jury.

5. An alleged error not brought to the attention of the trial court will not be considered by this court on a review of the case by petition in error. Ecklund *v.* Willis, 42 Nebr., 737, followed.

6. There is nothing in the Constitution of the United States or of this State which forbids classification of subjects for the purpose of legislation. The power to classify is subject only to the limitation that the classification must not be arbitrary.

7. The provision of section 3 of the valued policy law (section 45, chapter 43, Compiled Statutes, 1899), permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy, and is constitutional.

66 DAY, *C.*:

For brevity the parties will be referred to as plaintiff and defendant as they appear in the court below.

This action was brought by plaintiff on appeal from the county court to the district court of Holt county, against the defendant—the basis of the action being an insurance policy issued by the defendant to the plaintiff, dated April 26, 1892, and expiring April 26, 1897. The consideration for the policy was plaintiff's note for $36, dated April 26, 1892, and due December 1st, 1892. The specific property covered by the policy and the amount of insurance thereon were as follows: $800 upon the dwelling-house; $300 on barn number one; $200 on barn number two, and $500 on cattle. The dwelling-house was wholly destroyed by fire on March 14, 1896. The trial resulted in a verdict for plaintiff for $837, upon which with accrued interest, a judgment was subsequently rendered. To review this judgment defendant brings error to this court.

The answer admitted the issuance and delivery of the policy, but alleged that the note given for the premium contained a stipulation that the company should not be liable for any loss or damage which might occur to the property while the note or any part thereof was past due and unpaid; that at the time of the alleged fire the note was past due and unpaid and still remains unpaid; that the policy by its terms became suspended and inoperative and no liability attached to the defendant thereunder. The policy contained a stipulation as follows: "If a note be given for the premium on this policy or any part thereof, it is mutually agreed and understood by and between the assured and the company that in case said note or any part thereof be not paid at maturity, this policy shall be suspended, in-

operative and of no force and effect so long as such note or any part thereof remains overdue and unpaid. And in case of any loss of said property, either partial or total, while said note or any
67 part thereof remains overdue and unpaid, this company shall not be liable for said loss, nor shall the payment of said note or the receiving or retention of the proceeds or any part thereof by this company, render it liable for any loss occurring while said note or any part thereof remains overdue and unpaid; nor shall such payment or retention be said to be a waiver of any condition in the policy or obligation, the payment of the premium, however, revives this policy and reinstates the same for the remainder of this term only."

The reply alleged that previous to the fire it had been mutually agreed that the contract of insurance was severed; that the dwelling-house was insured separately from the other property; that the defendant received from plaintiff full payment of the premium on the dwelling-house prior to the loss. By order of the court, the petition filed in the county court was to stand as the petition in the district court, to which defendant filed answer and plaintiff filed reply.

It will not be necessary to consider all of the numerous errors alleged in the petition in error, such as are not argued in the brief will be deemed to have been waived. One of the assignments relates to the overruling of the motion to strike the reply from the files.

Immediately after the jury was sworn, the defendant called the county judge as a witness, presumably to show by oral testimony that the issue presented by the pleadings was different from what it was in the county court. Upon objection to the examination of the witness on the ground that its purpose was not disclosed, defendant made an oral motion to strike the reply for the reason that the pleadings presented a new issue from the one tried in the county court; but before the motion was passed on, or any testimony taken in support thereof and apparently immediately following the motion to strike the reply, the defendant suggested a diminution of the record. A colloquy followed between the court and counsel for both sides, at the conclusion of which, the court
68 made a ruling: "The order is granted and I will look up the question of jeopardy." This is the only ruling disclosed by the record on the motion to strike the reply; and to this ruling no exception was taken by the defendant. The order of the court is indefinite as to its application to the motions then before the court but it referred to the diminution of the record—otherwise there would have been no occasion to have proceeded with the trial upon the theory the case was tried.

It would have been an easy matter by comparison of the pleadings in the county court with those in the district court to determine whether a new issue had been raised. The record brought to this court shows the proceedings had in the county court and discloses that plaintiff was granted leave to file a reply and that a reply was filed; but it is not set out in the transcript. If it had become lost,

its contents could have been established by competent evidence. If the defendant desired to insist on its motion to strike it should have interrogated the witness further, and if denied that right, made its offer to prove the fact. Failing to do this, there is nothing presented in this assignment of error for our review.

Assignment of error number four is: "In permitting the trial of issues not raised in the trial in the county court, where the case originated." Nowhere in the record is it shown what the issues were in the county court, nor is it shown in what respect the issues tried in the district court were different from those that were tried by the county court. There is, therefore, nothing before us from which it can be determined whether the issues were the same or not. Defendant started to show the difference, if any, at the entrance of the trial, but did not persevere long enough to prove any difference. At the conclusion of the evidence, defendant made an offer "to show that the issues in the case and tried in this court are different and other issues from the issues in the court below." But the offer did not inform the court in what
69 respect the issues differed, nor what the issues were in the court below, nor any facts from which such conclusion could be drawn. The offer was a mere conclusion—the facts should have been stated so that the court could say from them whether a new issue was presented. From the record made, this court is unable to say that the offerred testimony, if received, would have shown any difference. "Exceptions to the exclusion of testimony are unavailing unless there be tender made of the proof *of* which it was sought to elicit." (Union P. R. Co. *v.* Vincent, 58 Nebr., 172; Hambleton *v.* Fort, 58 Nebr., 282.)

Defendant insists that on the pleadings and evidence it was entitled to a verdict as a matter of law. This contention rests in part, upon the peculiar state of the pleadings. Plaintiff had stated one part of his cause of action in the petition and the remainder of it in the reply. The answer admitted a part of the petition including some facts that were at variance with the reply To illustrate: The petition charged that the consideration for the issuance of the policy was plaintiff's note for $36; and the property described as being covered by the policy was the dwelling-house only. The answer admitted this, but alleged the note had not been paid and pleaded conditions of the note and policy which would suspend its operation. The reply alleged that the contract had subsequently been severed and that the amount of premium on the dwelling-house for the full period had been paid and that the balance due upon the note was for the premium upon the other items of property covered by the policy.

With this confusion as a basis, defendant contends that the facts alleged in the petition which were expressly admitted in the answer became conclusively established for the purpose of trial and could not be avoided by a reply. As a general rule of pleading we think this contention is correct, but as applied to the procedure adopted by the defendant in this case the claim is too broad.

70 If the defendant had moved the court to strike the reply or a part thereof because the allegations therein were inconsistent with the material allegations of the petition we think it would have been sustained; but where no objection is made on that ground in the district court, and the issues are presented and submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. Gregory *v.* Karr, 36 Nebr., 533.

The petition should contain a full statement of the facts constituting plaintiff's cause of action, and the facts should be stated so as to harmonize with the proof produced at the trial. It is no part of the office of a reply to contain allegations which are necessarily a part of the cause of action and which must be sustained by plaintiff's proof in opening. Wigton *v.* Smith, 46 Nebr., 461; Anderson *v.* Imhoff, 34 Nebr., 335.

Where the pleader has interchanged these offices, the defendant in the trial court must move at the proper time in the interest of better pleading or he will be deemed to have waived the defect. He cannot go to trial and after verdict against him, be heard to object that the cause of action is stated in the reply. Vernon *v.* Union Life Ins. Co., 58 Nebr., 494.

The contention of defendant that it was entitled to a verdict on the pleadings and evidence, is also supported by an exhaustive analysis of the evidence. There was a difference in the testimony given by the plaintiff and that given by the principal witness for defendant concerning the severance of the policy and the application of payments. In many details they were in complete harmony; and both agreed that the company was to approve the request of plaintiff before it would become operative, and the agent was to communicate from Lincoln, after submitting the question to the company. He did communicate in a letter, omitting formal

71 parts, as follows:

"Frank Dabney, dear sir: Enclose your policy. Everything O K. Note extended to fall due same time as last one." The letter is so indefinite that it will sustain almost any contention based on the policy. Plaintiff testified that when the payment of $10 was made, no instruction was given as to how it should be applied; that later, when the agent adjusted the loss on a steer which had been killed by lightning, that plaintiff wanted the amount—$17.86, applied on the note, so that the house would be insured anyhow; that the agent thought it would be all right to apply the payment that was already paid on the house and that he would write when he got to Lincoln. He was then asked:

"What did he say about insurance on the dwelling-house of $800?

He said it would be all right.

Well, express how it would be all right?

If it would be satisfactory to the company, and he thought it would, to apply the payment that was already paid on the house, and he would write me when he got to Lincoln, and the $17.86 apply that on the note. That the premium on the house was $16.

Now, what was to be done after you had paid the premium on the dwelling-house, the $16 and interest; what was to be done with the balance?

It was to be applied on the rest of the insurance."

The testimony of plaintiff tending to establish a severance of the contract, the conversations with the agent and the letter, together with the testimony of the agent, that he reported to the company all that was said between plaintiff and himself and that the letter was written in pursuance of the direction of the company, were all matters presenting an issue of fact, upon which there might be a difference of opinion and in submitting the issue of a severance
72 of the contract to the jury, we think the court acted wisely.

Defendant further urges that the clause in the policy suspending it, while the premium note is past due, is reasonable and just, and that nothing short of full payment or waiver of the stipulations can remove the suspension caused by the failure to pay the note. Granting this to be true, it cannot avail defendant, for the question was fairly submitted to the jury as to whether the contract had been severed and whether the full premium upon the dwelling had been paid. The jury resolved these questions in favor of the plaintiff.

Where the proofs before the jury are conflicting, the verdict will not be disturbed unless clearly not sustained by the evidence. Van Housen *v.* Bochl, 59 Nebr., 48; Chicago, M. & S. P. R. Co. *v.* Johnson, 58 Nebr., 236; Louis *v.* U. P. R. Co., 48 Nebr., 151. In our view there was evidence sufficient to sustain the verdict.

Defendant also contends that the verdict was excessive, the full amount of insurance upon the house destroyed, when there was a small sum still due upon the note originally given for the policy. This point might be well taken if a counter-claim had been filed for that amount. It did not do it nor did it call the attention of the court to it at the trial nor in the motion for a new trial. It is presented in this court for the first time. It is the established rule of the court in reviewing a case by petition in error to refuse to consider an alleged error that was not brought to the attention of the trial court. Ecklund *v.* Willis, 42 Nebr., 737; Clark *v.* State *ex rel.* Carey, 41 Nebr., 780; Bankers' Life Ins. Co. *v.* Robbins, 59 Nebr., 179; Broadwater *v.* Foxworthy, 57 Nebr., 406.

The district court, on the day the motion for a new trial was overruled, entered an order finding there was due the plaintiff from the defendant, a reasonable attorney's fee in the case in the sum of $150, and taxed this amount as part of the costs. This order was
73 made under the authority of section 45, chapter 43, Compiled Statutes which provided; "The court upon rendering judgment against an insurance company, upon any such policy of insurance shall allow the plaintiff a reasonable sum as attorney's fee to be taxed as a part of the costs."

A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional and to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be

said to be an open one in this State. The precise question has been decided by this court and many of the authorities cited in the brief of defendant were considered and reviewed by the court.

In Lancashier Ins. Co. *v.* Bush, 82 N. W. Rep., 313 — Neb. — in which Judge Sullivan, referring to the decisions of our own court, says: "These decisions are vigorously attacked, but we are convinced as a result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the Constitution of the United States or of this State which forbids classification of subjects for the purpose of legislation. Barbier *v.* Connelly, 113 U. S., 27, 5 Sup. Ct. Rep., 357, 28 L. Ed. 923; Railroad Co. *v.* Matthews, 174 U. S., 96, 19 Sup. Ct. Rep., 609, 43 Ed. 909; State *v.* Farmers' & Merchants' Irr. Co., 59 Nebr. —, 80 N. W. Rep. 52." * * * "The legislature, we think, — within its constitutional power in selecting this class of insurance companies from all other litigants and subjecting them, if unsuccessful, to the payment of attorney's fees, because experience and observation had shown that the defenses upon which they generally rely are without merit, and con-tructed out of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interests and promote justice. It was an exercise of legislative power justified by considerations of public policy. Similar statutes have been held valid in other jurisdictions.
Railroad Co. *v.* Mower, 16 Kan., 573; Railroad Co. *v.* Mat-
74 thews, 58 Kan. 447, 49 Pac. Rep. 602; Railroad Co. *v.* Duggan, 109 Ill., 537; Perkins *v.* Railway Co. 103 Mo., 52, 15 S. W. Rep., 320; Railway Co. *v.* Dey, 82 Ia. 312, 48 N. W. Rep., 98; Wortman *v.* Kleinschmidt, 12 Mont., 316, 30 Pac. Rep., 280; Cameron *v.* Railway Co., 63 Minn., 384, 65 N. W. Rep., 652; Vogel *v.* Pecoc, 157 Ills., 339, 42 N. E. Rep., 386."

In numerous cases this court has sustained an allowance for attorney's fee as part of the costs under this statute. Insurance Co. of North America *v.* Bachelor, 44 Nebr., 549; Hanover Fire Ins. Co. *v.* Gustin, 40 Nebr., 283; American Fire Ins. Co. *v.* Landfare, 56 Nebr., 482; Hartford Fire Ins. Co. *v.* Corey, 53 Nebr., 209; German Ins. Co. *v.* Eddy, 37 Nebr., 461; Insurance Co. *v.* Skoumal, 51 Nebr., 655; Insurance Co. *v.* Weed, 55 Nebr., 146.

It is therefore recommended that the judgment be affirmed.

Hastings, C. and Kirkpatrick, C. concur.

By the COURT: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

75 THE STATE OF NEBRASKA, ss:

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion of the court, and final judgment in a cause in said court wherein The Farmers' & Merchants' Insurance Company was plaintiff in error and Frank Dobney was defendant in error, as fully as the same is of record and on file in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court at Lincoln this 11th day of September, 1901.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk of Supreme Court.

Fees for this Transcript.

27,200 words, 10c. per 100	$27.30
Certificates	.50
	$27.80

Paid by H. F. Rose, att'y for F. & M. Ins. Co.

LEE HERDMAN,
Clerk Supreme Court of Nebr.,
By E. W. NELSON, *Deputy.*

76 In the Supreme Court of the State of Nebraska.

THE FARMERS' & MERCHANTS' INSURANCE Company, Plaintiff in Error, vs. FRANK DOBNEY, Defendant in Error. } Assignment of Errors.

Comes now The Farmers' & Merchants' Insurance Company, plaintiff in error in the above-entitled cause, and says that in the records and proceedings of the supreme court of Nebraska in said cause there is manifest error in this, to wit:

1. The said supreme court of the State of Nebraska erred in affirming the judgment of the district court of Nebraska within and for Holt county.

2. The said supreme court of the State of Nebraska erred in affirming the order of the district court of Holt county embodied in the journal entry in the words following: "The court finds that there is due the plaintiff from the defendant, as a reasonable attorney's fee in this case, the sum of $150, and it is ordered and considered by the court that said $150 be taxed as part of the costs herein."

3. The said supreme court of the State of Nebraska erred in holding and deciding that section 45 of chapter 43 of the Compiled Statutes of Nebraska, under which the trial court assumed to allow and order an attorney's fee to be taxed, is not violative of the Constitution of the United States.

4. The said supreme court of the State of Nebraska erred in holding that the Farmers' & Merchants' Insurance Company was liable to said Frank Dobney in the sum of $150, or any other sum, for an attorney's fee and in enforcing the provisions of section 3, chapter 48 of the Laws of Nebraska of 1889, and section 45 of chapter 43 of the Compiled Statutes of the State of Nebraska directing the taxation of an attorney's fee to plaintiff upon the rendition of judgment upon a policy insuring real estate, which said law is violative of

that clause in section 1 of the 14th amendment to the Constitution of the United States, which declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws" and, therefore, void.

77 5. The said supreme court of the State of Nebraska erred in holding and deciding the statute of said State of Nebraska in the words following, to wit: "The court upon rendering judgment against an insurance company in such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs," to be valid and enforceable, and not in conflict with the Constitution of the United States, the said pretended statute being section 3 of chapter 48 of the Laws of Nebraska of 1889 and section 45 of chapter 43 of the Compiled Statutes of Nebraska.

6. The said supreme court of the State of Nebraska erred in assuming authority to disregard the rule announced by the Supreme Court of the United States in the case of Gulf, Colorado & Santa Fe Railway *v.* Ellis, 165 U. S., 150, upon the ground that said supreme court of Nebraska had theretofore committed itself to the contrary doctrine, and in denying the authorit-ive force of the precedents of the Supreme Court of the United States upon the question presented as to the validity of said law directing the taxation of an attorney's fee against an insurance company, and upon which question the said State court is a court of intermediate jurisdiction only.

Wherefore, your petitioner, The Farmers' & Merchants' Insurance Company, respectfully prays that a writ of error may be issued in said cause directed to the clerk of the supreme court of Nebraska, directing the said clerk to certify and send to the clerk of the Supreme Court of the United States a full and complete transcript of the record and all of the proceedings of said court in said cause, wherein The Farmers' & Merchants' Insurance Company is plaintiff in error and Frank Dobney is defendant in error, and that said judgment of said supreme court of the State of Nebraska in said cause and every part thereof may be reversed by the Supreme Court of the United States and your petitioner will ever pray.

HALLECK F. ROSE,
Attorney for Plaintiff in Error.

(Endorsed:) 9888. Supreme court of Nebraska. Farmers' & Merchants' Ins. Co., plaintiff in error, *vs.* Frank Dobney, defendant in error. Assignment of errors. Supreme court of Nebraska, Filed Oct. 8, 1901. Lee Herdman, clerk. Halleck F. Rose, attorney for plaintiff in error.

78 In the Supreme Court of the State of Nebraska.

THE FARMERS' & MERCHANTS' INSURANCE Company, Plaintiff in Error, *vs.* FRANK DOBNEY, Defendant in Error. } # 9888. Petition for Writ of Error.

To the Honorable David J. Brewer, justice of the Supreme Court of the United States:

Your petitioner, The Farmers' & Merchants' Insurance Company, respectfully represents that on the 19th day of June, 1901, in the above-entitled suit and in the said supreme court of the State of Nebraska, a judgment was rendered against petitioner, which judgment is final and the court rendering the same is the highest court in said State in which a decision of said cause could be had.

Your petitioner further shows that in the rendition of said judgment by said supreme court of the State of Nebraska there was drawn in question the validity of a statute of the said State of Nebraska, on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

Said decision was necessary to the judgment given by the said supreme court of the State of Nebraska, and without the decision thereof the said judgment could not have been given.

Wherefore, petitioner prays the allowance by your honor of a writ of error to remove the record and proceedings in the said suit into the Supreme Court of the United States for its revision thereof and for a citation directed to the said Frank Dobney for his appearance in the said Supreme Court.

HALLECK F. ROSE,
Attorney for Petitioner.

(Endorsed:) 9888. Supreme court of Nebraska. Farmers' & Merchants' Ins. Co., plaintiff in error, *vs.* Frank Dobney, defendant in error. # 9888. Petition for writ of error. Supreme court of Nebraska. Filed Oct. 8, 1901. Lee Herdman, clerk. Halleck F. Rose, att'y for plaintiff in error.

79 *Supersedeas Bond.*

In the Supreme Court of Nebraska.

FARMERS' & MERCHANTS' INSURANCE COMPANY, Plaintiff in Error, *v.* FRANK DOBNEY, Defendant in Error. } Supersedeas Bond.

Know all men by these presents that we, The Farmers' & Merchants' Insurance Company, as principal, and Leonidas P. Funkhouser and Louis E. Wettling, as sureties, are held and firmly bound unto the above-named Frank Dobney in the full and just sum of one thousand dollars, to be paid to the said Frank Dobney, his certain

attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves; our heirs, executors and administrators, jointly and severally by these presents.

Dated this 15th day of October, 1901.

Whereas, lately at a term of the above-named court, and in a suit depending therein between the above-named Frank Dobney, as plaintiff, and said Farmers' & Merchants' Insurance Company, as defendant, judgment was rendered against the said Farmers' & Merchants' Insurance Company; and it having prayed and obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit; and a citation directed to the said Frank Dobney, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington, the 15th day of November, next.

Now the condition of the above obligation is such, that if the said Farmers' & Merchants' Insurance Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) FARMERS' & MERCHANTS' INSURANCE CO.
L. P. FUNKHOUSER, *Sec'y.*
LEONIDAS P. FUNKHOUSER.
LOUIS E. WETTLING.

Sealed and delivered in presence of—
HALLECK F. ROSE.

Approved by me this October 14th, 1901.
(Signed) DAVID J. BREWER, *Justice.*

(Indorsed:) Supreme court of Nebraska. Filed Oct. 22, 1901. Lee Herdman clerk.

[Endorsed:] Supreme court of Nebraska. Farmers' & Merchants' Ins. Co., plaintiff in error. *vs.* Frank Dobney, defendant in error. Supersedeas bond.

80 UNITED STATES OF AMERICA, *ss:*

To Frank Dobney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Farmers' & Merchants' Insurance Company was plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the

Supreme Court of the United States, this 14th day of October, in the year of our Lord one thousand nine hundred one.

DAVID J. BREWER, *Justice.*

[Endorsed:] 9888. F. & M. Ins. Co., *v.* Dobney. Citation. Supreme court of Nebraska. Filed Nov. 6 1901 Lee Herdman, clerk.

O'NEILL, NEBRASKA, *October* 29, 1901.

I hereby waive service of the within citation and accept due and lawful service thereof to have the same force and effect as if service had been legally made by the proper officer.

FRANK DOBNEY,
By M. F. HARRINGTON,
His Attorney.

81 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Farmers' & Merchants' Insurance Company, plaintiff in error, and Frank Dobney, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Farmers' & Merchants' Insurance Company as by *his* complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of October, in the year of our Lord one thousand nine hundred one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court United States.

Allowed by—
DAVID J. BREWER, *Justice.*

[Endorsed:] Supreme court of Nebraska. Filed Oct. 22 1901 Lee Herdman clerk.

THE STATE OF NEBRASKA:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of Nebraska at my office in the city of Lincoln, this 6th day of November, A. D., 1901.

LEE HERDMAN,
Clerk Supreme Court Nebraska.

82 THE STATE OF NEBRASKA, ss:

Pursuant to the foregoing writ of error, and in obedience thereto, I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing pages from one (1) to seventy-eight (78), inclusive, contain true and faithful transcripts of all the pleadings, processes, and proceedings of record and on file in said court in the case of The Farmers' & Merchants' Insurance Company, plaintiff in error, *vs.* Frank Dobney, defendant in error, and that copies of the writ of error and citation, duly certified, have been lodged and remain in my office as such clerk.

Witness my hand and the seal of said supreme court of Nebraska at Lincoln in said State this 6th day of November, A. D., 1901.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk Supreme Court Nebraska.

Endorsed on cover: File No. 18312. Nebraska supreme court. Term No. 189 The Farmers' and Merchants' Insurance Company, plaintiff in error, *vs.* Frank Dobney Filed November 11, 1901.

No. 189.

NOV 28 1902

JAMES H. McKENNEY,
Clerk.

BRIEF OF PLAINTIFF IN ERROR.

Br. of Rose for P.C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Filed Nov. 28, 1902.

No. 189.

THE FARMERS AND MERCHANTS INSURANCE COMPANY,

Plaintiff in Error,

v.

FRANK DOBNEY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

HALLECK F. ROSE,

For Plaintiff in Error.

(18,312.)

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE FARMERS & MERCHANTS INSURANCE COMPANY,
Plaintiff in Error,
v.
FRANK DOBNEY,
Defendant in Error.

No. 189.
IN ERROR TO THE SUPREME COURT OF NEBRASKA.

HALLECK F. ROSE, *Counsel for Plaintiff in Error.*

BRIEF OF PLAINTIFF IN ERROR.

I.

Statement of the Case.

The plaintiff in error, an insurance company organized under the laws of Nebraska, was sued in the district court of Holt County, Nebraska, upon a policy of fire insurance written upon a dwelling house, including foundation. The insured tenement was part of the realty. The petition stating the cause of action is found in the printed record at pages 1 to 4.

After return of a verdict against the company, a motion for a new trial, assigning numerous errors, was filed in the

cause. This motion was subsequently overruled by the court and an exception taken (printed record, p. 16). At the time of overruling the motion for a new trial and entering judgment, there was embodied in the journal entry (printed record, p. 17) an order in the following words:

"The court finds there is due the plaintiff from the defendant, as a reasonable attorney's fee in this case, the sum of $150, and it is ordered and considered by the court that said $150 be taxed as part of the costs herein."

Under the practice obtaining in Nebraska, it is not necessary to assail the order taxing this item of costs by motion to retax. In this jurisdiction, if the liability of the party for costs is directly considered and determined by the trial court, it may be reviewed in the supreme court on petition in error, without any motion being interposed in the lower court to retax. (*Burton v. State,* 34 Neb., 125-127; *Hartford Fire Ins. Co. v. Corey,* 53 Neb., 209-212; *Lamaster v. Elliott,* 53 Neb., 424-430.)

Conforming to the practice obtaining in that jurisdiction, the company, by its petition in error in the supreme court, attacked the order above set forth taxing an attorney's fee of $150 against it in favor of plaintiff. The petition in error filed in the supreme court of Nebraska is found in the printed record at pages 38 to 40. The sixteenth, seventeenth and eighteenth assignments of error, in the petition addressed to that court, are as follows:

"16. The court erred in allowing an attorney's fee to plaintiff and ordering the same to be taxed as part of the costs.

"17. The taxation of an attorney's fee to plaintiff was without authority of law, and the said order is invalid and operates to deprive the defendant of its property without due process of law.

"18. Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney's fee to be taxed, is unconstitutional and void for

want of mutuality of the provisions, and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, and in conflict with section 3 of article 1, and section 15 of article 3 of the Constitution of Nebraska."

The affirmance of the judgment in the state supreme court (printed record, p. 41) was necessarily an approval of the order taxing an attorney's fee. The opinion of Commissioner DAY, of the state supreme court, appears in the printed record at pages 41 to 47. The federal question raised, involving the validity of the order taxing $150 against the company for the use of the assured's attorney, was directly passed upon. The commissioner was of opinion that the act under which the attorney fee was allowed was invalid, but felt that the former rulings of the state court precluded him from so holding. From his opinion (printed record, pp. 46, 47), we quote the following:

"The district court, on the day the motion for a new trial was overruled, entered an order finding there was due the plaintiff from the defendant, a reasonable attorney's fee in the case in the sum of $150, and taxed this amount as part of the costs. This order was made under the authority of section 45, chapter 43, Compiled Statutes, which provided: 'The court upon rendering judgment against an insurance company, upon any such policy of insurance shall allow the plaintiff a reasonable sum as attorney's fee, to be taxed as a part of the costs.'

"A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional, and, to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one *in this state.* The precise question has been decided by this court and many of the authorities cited in the brief of defendant were considered and reviewed by the court."

II.

Assignment of Errors.

The assignment of errors filed in the state supreme court by the company, presenting the federal question upon which a writ of error was allowed by Mr. Justice BREWER, contains the following specifications (printed record, pp. 48-49):

"1. The said supreme court of the State of Nebraska erred in affirming the judgment of the district court of Nebraska within and for Holt County.

"2. The said supreme court of the State of Nebraska erred in affirming the order of the district court of Holt County embodied in the journal entry in the words following: 'The court finds that there is due the plaintiff from the defendant, as a reasonable attorney's fee in this case, the sum of $150, and it is ordered and considered by the court that said $150 be taxed as part of the costs herein.'

"3. The said supreme court of the State of Nebraska erred in holding and deciding that section 45 of chapter 43 of the Compiled Statutes of Nebraska, under which the trial court assumed to allow and order an attorney's fee to be taxed, is not violative of the Constitution of the United States.

"4. The said supreme court of the State of Nebraska erred in holding that the Farmers & Merchants Insurance Company was liable to said Frank Dobney in the sum of $150, or any other sum, for an attorney's fee and in enforcing the provisions of section 3, chapter 48 of the Laws of Nebraska of 1889, and section 45 of chapter 43 of the Compiled Statutes of the State of Nebraska directing the taxation of an attorney's fee to plaintiff upon the rendition of judgment upon a policy insuring real estate, which said law is violative of that clause in section 1 of the 14th amendment to the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' and, therefore, void.

"5. The said supreme court of the State of Nebraska erred in holding and deciding the statute of said State of

Nebraska in the words following, to-wit: 'The court upon rendering judgment against an insurance company upon such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs,' to be valid and enforceable, and not in conflict with the Constitution of the United States, the said pretended statute being section 3 of chapter 48 of the Laws of Nebraska of 1889 and section 45 of chapter 43 of the Compiled Statutes of Nebraska.

"6. The said supreme court of the State of Nebraska erred in assuming authority to disregard the rule announced by the Supreme Court of the United States in the case of *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S., 150, upon the ground that said supreme court of Nebraska had theretofore committed itself to the contrary doctrine, and in denying the authoritative force of the precedents of the Supreme Court of the United States upon the question presented as to the validity of said law directing the taxation of an attorney's fee against an insurance company, and upon which question the said state court is a court of intermediate jurisdiction only."

III.

Argument.

Section 3 of the valued policy law of Nebraska (Laws, 1889, ch. 48; Comp. Stats., ch. 43, sec. 45), directing the taxation of an attorney's fee to plaintiff on rendition of judgment on a policy insuring real estate, is violative of that clause in section 1 of the Fourteenth Amendment of the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and is therefore void.

Since the state supreme court is but an intermediate tribunal, in matters involving construction of the federal constitution and statutes, it is somewhat remarkable that

it should attempt to justify a departure from the authoritative ruling of this court, upon the ground that its own decisions had committed the state court to the contrary doctrine. This is the situation, however, presented by the record in the case at bar. The sole question raised is as to the constitutional validity of that provision in the Statutes of Nebraska requiring the courts, upon rendering judgments against insurance companies, upon policies insuring realty fixtures, to allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs in the case. The particular provision is contained in chapter 48 of the Laws of Nebraska of 1889, "An act defining the liability of *fire* insurance companies in *certain cases*." The act contains three sections, which are also found in the Compiled Statutes of Nebraska, chapter 43, sections 43, 44 and 45. We here quote the act in full:

"Section 1. Whenever any policy of insurance shall be written to insure any real property in this state, against loss by fire, tornado or lightning and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

"Sec. 2. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

"Sec. 3. The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs."

The provision for taxation of an attorney's fee relates solely to the administration of justice between the insurer and the insured, in the cases, only, where litigation proceeds to "judgment against an insurance company." It

grants a valuable pecuniary privilege to one party, as an incident to rendition of judgment in his favor—an undefined and unlimited sum to be fixed in the discretion of the court, termed part of the "costs." The language of the statute providing for its taxation as part of the costs excludes any idea of enforcement of any voluntarily assumed contract obligation. While giving this pecuniary advantage to plaintiff when successful, it exempts him from any corresponding obligation if he is unsuccessful in the litigation; and it likewise imposes a burden on the company failing in its defense, without any reciprocal benefit if it wins. One party is invited to sue without hazard of costs of his adversary's attorney; the other may only defend at the price of his adversay's attorney fee.

The mere reading of the statute is a sufficient answer to any suggestion that the obligation to pay attorney's fees, by virtue of the enactment, enters into and becomes a part of the contract obligation of the insurer. If such were intended to be the effect, why is it termed "costs" in the statute? The terms of the statute expressly exclude any such meaning. The full measure of liability under the contract is limited, fixed, and defined in section 1 of the act: "The amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages." Section 3 purports only to affect the procedure and practice of courts in administering justice in this particular class of insurance cases. Awarding judgment for damages and costs is, in fact, the administration of justice; and such power must be exercised with due regard to the equal rights of both parties litigant. The statute may not offer one party a reward to sue, and impose on the other a penalty to induce surrender of right to defend.

It is equally clear that the imposition here does not apply to a class of business or a character of liability justifying imposition of penalties to secure life and property, or

to prevent commission of unlawful acts, under the police power. Of this class, statutes have been upheld imposing double damages for trespass, for failing to fence a railway, for taking illegal or excessive fees, and the like. In all these cases, the liability originates in the transgression of some law, the violation of some imposed public duty. The exercise of police power never has, and, so long as constitutional safeguards remain unimpaired, never can extend to mere violations of private contract rights not affecting public interests.

The obligation of the insurer rests on private contract. Liability matures, not by any act of the insurer, but through the casualty of a fire. The prompt enforcement of the insurer's obligations would not tend to lessen the number of conflagrations—the tendency would be rather to increase the dangers to the public from that cause. The insurer has no motive to use the torch; the insured sometimes has. Obligation to pay a loss, from the nature of the contract, cannot arise from violation of law by the *insurer;* it may be and sometimes is asserted by a *claimant* guilty of arson. It is clear, therefore, that the object aimed at, by the law under consideration, is enforcement of a private, individual, contract obligation, not affecting public interests; and so the law is not justifiable as an exercise of the police power of the state. The record, therefore, throws upon this court the responsibility of determining whether, under the clause of the federal constitution referred to, the state legislature has power so to debauch the administration of justice by discriminating between suitors, or parties to the same litigation, as to arm the plaintiff with special and important pecuniary advantages over his adversary at his adversary's cost?

Section 1, of Article XIV of Amendments to the Constitution of the United States, provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S., 150-165, is a controlling and conclusive precedent against the validity of the provision of the Nebraska law for taxation of an attorney's fee in this case. The case was on error to the supreme court of Texas to test the validity of an act of the legislature of that state providing for taxation of an attorney's fee of $10 in certain cases of claims against railroads, including "personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured," and where, after notice and failure for a stated term to pay, plaintiff recovered the full sum demanded. The opinion of Mr. Justice BREWER, holding the act unconstitutional, rests on two grounds, both of which are distinctly adjudged, and each of which is conclusive.

First—Under the equality clause of the Fourteenth Amendment the act under consideration was invalid, because requiring railroads in certain cases to pay attorney fees to parties successfully suing them, while giving them no like or corresponding benefit. On this point, Mr. Justice BREWER used the following language:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney fees of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the

courts upon equal terms. They must pay attorney fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Second—The power of the states to make reasonable classifications, dealing alike with all persons of a certain class, is held, as a general proposition, not to be denied by the Fourteenth Amendment; but, to be valid, the classification must be a natural one, resting upon some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. The opinion also concedes that the equality clause does not prohibit the proper exercise of police power by the states; but holds it cannot be avoided by mere classification. We quote the concluding paragraph:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment; and that in all cases it must appear not only that a classification has been made, but also that it is one based on some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

That case cannot logically be distinguished from the one at bar. The duty to discharge a contract obligation is equal on all debtors, individuals, partnerships, companies, and corporations. The selection by the Nebraska law is purely an arbitrary one. The penalty is imposed only on fire insurance companies, and then only in certain cases where policies insure real property. It has no application to personalty risks. It does not apply to life and accident insurance, where measure of damages is uni-

formly liquidated and fixed by contract. Nor does it apply to any other contract debts. Its application is not even limited to valued risks, where the sum due is fixed and liquidated by contract. It is true real estate risks in Nebraska are now carried only by valued policies. But under valued policies the measure of damages is only liquidated in cases where the subject of insurance is wholly destroyed. In all other cases there is no difference between valued and open policies. But even in cases of partial loss, and with honest difference of opinion as to damages, this law applies. (*Ins. Co. v. Gustin*, 40 Neb., 828.) It cannot be held a natural classification. It is a purely arbitrary, discriminatory selection of a particularly narrow class of debtors, singled out from all others for the imposition of a penalty for presuming to defend against demands of a limited class of policy holders.

The act is exceptionally odious and pernicious because the penalty is uncertain, not to be anticipated in any case, but depending upon the claimant's cupidity and elasticity of conscience and the temper of the court fixing the amount of the fee. In this case on an $800 item a trial fee of $150 was taxed in the district court. The members of the profession are gradually learning to testify, without compunctions, that to prosecute an insurance case to judgment is worth from one-fourth to one-half the amount involved. Compared with the Nebraska law here in question, the encroachments of the Texas act on the constitutional rights of railroads were trivial. The limit there was $10. Here, while the right to claim salvage is *closed* to the defendant under a valued policy, the amount of additional liability that may be exacted by plaintiff by way of an attorney's fee is left open. However viewed, the act is violative of the equality clause of the Fourteenth Amendment, and under the precedent of *Ellis's case* it would seem to be the duty of this court to so adjudge it.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S., 97, reinforces the rule in *Ellis's case* above referred to. While

this court there held valid a statute of Kansas providing for the assessment of an attorney's fee against railroads in cases where damages were recovered on account of fire caused by operating the railroad, it was stated in the opinion (p. 100): "The purpose of this statute is, as declared by the supreme court of Kansas, protection against fire—a matter in the nature of a police regulation." In the opinion (pp. 97-98) the doctrine of *Ellis's case* was reaffirmed in the following language:

"In support of this contention great reliance is placed upon *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S., 150 (41:666). In that case a statute of Texas allowing an attorney fee to the plaintiffs in actions against railroad corporations on claims not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the supreme court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive."

It is not possible to justify the act in question as resting upon any reasonable classification bearing any just relation to any business or occupation sought to be controlled or regulated. Where a fire destroys the landlord's property and also the personal property of the tenant occupant, both landlord and tenant having insurance, the

rights of both against the insurance company should be equal. A law favoring the landlord in such case is wholly arbitrary and discriminatory. The character of the undertaking of the underwriter is identical in both cases, and his obligation to each is equally sacred. The law, in such case, making the landlord a favored suitor cannot be upheld on any precedent found in this court, and cannot be sustained upon principle.

The Nebraska court, in analogous cases, has itself upheld the position contended for by plaintiff in error. Its Code of Civil Procedure provides:

"Sec. 596. When a judgment or final order shall be affirmed in the supreme court, the said court shall also render judgment against the plaintiff in error for five per cent upon the amount due from him to defendant in error, unless the court shall enter upon its minutes that there was reasonable ground for the proceedings in error."

A constitutional provision of that state declares (art. 1, sec. 24):

"The right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied."

In *Moore v. Herron*, 17 Neb., 703, a motion to tax the penalty of five per cent. on affirmance was overruled, one ground of decision being that the imposition of the penalty was a violation of the constitutional provision above quoted. Speaking of the right of appeal the court said:

"This privilege is conferred as a *right*, and while the *unsuccessful party* may, and in most cases will, be taxed with the costs of the appellate proceedings, yet it is not the policy of the law to, in effect, declare that a wrong by the imposition of a penalty *which the fundamental law confers as a right.*"

At least twice the court has been asked to re-examine the point, and it has each time referred to that precedent

as conclusive, and approved the ruling. *Garneau v. Omaha Ptg. Co.*, 42 Neb., 847; *Coburn v. Watson*, 48 Neb., 257.

In *Atchison & N. R. Co. v. Baty*, 6 Neb., 147, the question before the court was as to the constitutionality of a law "giving to the owner of live stock double the value of his property injured, killed or destroyed" on a railroad track, in case the same is not paid in thirty days after demand.

Judge GANTT in his opinion said:

"It may be stated as an established maxim in the polity of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard of the public welfare.

"Now the statute in question is partial. It applies to one class only; but it is said that the lawmakers 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plow,' and this rule is said to be 'a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.' Cooley Const. Lim., 392. In *Walley's Heirs v. Kennedy*, 2 Yerg., 554, it is held that 'the rights of every individual must stand or fall by the same rule, or law, that governs every member of the body politic, or land, under similar circumstances; and every private or partial law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.' Hence, 'that is not legislation which prescribes a rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government.'"

In *Grand I. & W. C. R. Co. v. Swinbank*, 51 Neb., 521, the court was asked to re-examine the constitutional question decided in *A. & N. R. Co. v. Baty*, but it refused to overturn the former ruling.

A law of Texas, passed in 1889, imposed as a condition of perfecting appeals by receivers, special provisions in all

cases touching appeal bonds. The validity of this law was raised in the supreme court of that state, which held (syllabus):

Such act is void, as it violates Const. Tex., art. 1, sec. 13, which declares that "all courts shall be open, and every person, for any injury done him * * * shall have remedy by due course of law," in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed in the case of other persons. *Dillingham v. Putnam*, 14 S. W. [Tex.], 303.

The court in the opinion in Dillingham's case, speaking of the constitutional provision that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law," said:

"This applies to a *defendant* as well as a plaintiff. 'Due course of law,' in a cause tried in a district court, means a trial *according to the settled rules of law in that court;* and a further hearing in this court if either party to the litigation desires it after a final judgment in the trial court."

To the same effect are: *Durkee v. Janesville*, 28 Wis., 465-471; *South & N. A. R. Co. v. Morris*, 65 Ala., 199; *St. L., I. M. & S. Ry. v. Williams*, 49 Ark., 492-498; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss., 631-652.

Durkee v. Janesville, 28 Wis., 465-471, was an appeal from taxation of costs against the defendant city, contrary to a statute which declared that no costs shall be recovered against the city in any action where the same is commenced to set aside any tax assessment or tax deed, or to prevent the collection of taxes or assessments in said city. Chief Justice DIXON, in his opinion, said:

"Certainly no discrimination more arbitrary, unjust, and odious, between one individual or corporation and another, *or every other,* in a matter where the rights and privileges of all should be equal, could well be than would

thus be established if such acts were valid. The city of Janesville would have a special privilege or advantage not given to any other like corporation under the same circumstances. But the most odious feature of the law would appear from its application as between the immediate parties to the suit. No costs could be recovered against the city in this particular class of cases. That is the extent of the supposed suspension or repeal of the general law. Costs may be recovered by the city or taxed in its favor. In this case, had the city prevailed or the plaintiff been the losing party, costs must have been taxed against the plaintiff according to the general law. Thus, whilst the city would recover costs, upon judgment in its favor, it would pay none, and not be liable for any if the opposite party were successful. The costs and expenses taxable by law in every suit involving important questions like those affecting taxation and assessments are very considerable, and especially in this court. The costs here were taxed by the clerk at $141. If successful the city would have recovered them against the plaintiff; but if unsuccessful it is claimed that the plaintiff shall recover nothing. Words cannot make the inequality and injustice of the rule plainer than it thus appears; and the question is whether the legislature can so discriminate between suitors or parties to the same litigation in a court of justice as that one of them shall have such special and important pecuniary advantage over the other. I, for one, think not. * * *

"Section 9, article 1 [Const. Wis.], declares: Every person shall have *a certain remedy* in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws. I had occasion to express my views of the proper construction and effect of this section in *Phelps v. Rooney*, 12 Wis., 705, 706. It is obvious there can be no *certain* remedy in the laws, where the legislature may prescribe one rule for one suitor *or class of suitors* in the courts, and another for all others under like circumstances, or may discriminate between *parties to the same suit*, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely and without being obliged to purchase it. To the extent

of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision.

"Certainty of remedies implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons *or parties* alike, and be equally free and favorable to all.

"The grant of legislative powers, though without prohibition or restraint that the legislature shall not discriminate and do gross and palpable injustice between man and man, by the passage of unequal and partial laws, does not carry with it the power to pass such laws. Such a power, from its very nature, is 'fore-prized' and taken out of the grant, without any express exception or limitation; and the act, though in form of law, yet not being within the scope of the authority conferred, is not legislation at all, and so is void."

To the same effect are: *Calder v. Bull*, 3 Dallas, 387, 388; *Fletcher v. Peck*, 6 Cranch, 143; *Wilkinson v. Leland*, 2 Peters, 656, 658; *Ferret v. Taylor*, 9 Cranch, 50.

Wilder v. Chicago & W. M. Ry., 70 Mich., 382, 386, involved the validity of Act No. 234, Laws of 1885, Mich., allowing a plaintiff in a suit against a railroad company to recover for killing cattle, to tax as part of his costs, an attorney's fee of $25. In his opinion holding the law unconstitutional, MORSE, J., said:

"But the imposition of the attorney fee of $25 as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This

statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit; the railroad company can recovery only the ordinary statutory costs of $10 in justice's court; but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. *Durkee v. Janesville*, 28 Wis., 464, 468.

"Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties, in the disguise of costs, upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts when suits are brought against them." Followed in *Lafferty v. Chicago & W. M. Ry.*, 71 Mich., 37.

San Antonio & A. P. Ry. v. Wilson, 19 S. W. [Tex.], 910, involved the validity of a statute declaring that in event a railroad company refused to pay an employee within fifteen days of demand, "it shall be liable to pay such employee twenty per cent. on the amount due him as damages." The court held the act invalid and unconstitutional, because "not protecting alike the interest of employer and employee." In the opinion it is said:

"No well-considered case can be found *sustaining a penalty on an ordinary contract* where public interest was not

involved. Before the tribunals of justice the ordinary litigant can only recover his interest and costs, except where there is fraud, or acts on the border land of crime, where he may recover exemplary damages as a recompense to himself and punishment to the offender (Sedgw. Dam., 371; *Railway Co. v. Humes*, 115 U. S., 512). * * * We think that an exception that undertakes to single out a single class and attach a penalty to a failure to pay one class of their creditors is not 'the law of the land,' and cannot be sustained. *In re Zicbold*, 23 Fed. R., 791. * * * In the *Civil Rights Cases* the Supreme Court of the United States says, in speaking of the fourteenth amendment: 'It nullifies and makes void all state legislation and state action of every kind which impairs the privileges of citizens of the United States, or injuries them in life, liberty, or property, without due process of law, or denies to any of them the equal protection of the laws.' 109 U. S., 24; 3 Sup. Ct. R., 21."

In *Wally v. Kennedy*, 2 Yerg. [Tenn.], 554-557, an act directing dismissal of certain classes of suits, growing out of the reservations of land to heads of Indian families, upon a certain state of facts being made to appear, was held unconstitutional. In the opinion of the court, it was said:

"The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law by another; whereas a like general law affecting the whole community equally could not have been passed. * * * The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legislative power. Any other construction of the constitution would set up the majority

in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure by odious laws binding on the latter."

To same effect are: *Bank v. Cooper,* 2 Yerg. [Tenn.], 605; *Jones v. Perry,* 10 Yerg. [Tenn.], 71-2; *Budd v. State,* 3 Humph. [Tenn.], 491.

The constitution of Alabama, Bill of Rights, provides:

"Sec. 14. That all courts shall be open, and that every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

The Alabama Legislature (Code, sec. 1715) enacted:

"Any corporation, person, or persons owning or controlling any railroad in this state, or any complainant against such corporation, person, or persons taking an appeal from a decision rendered by a justice of the peace in suit for damages brought under the provisions of section 1711, and failing to sustain such appeal, or to reduce or increase the judgment before the appellate court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed twenty dollars; and the attorney's fee shall be part of the costs and collected as such."

In *South & N. A. R. Co. v. Morris,* 65 Ala., 199, the supreme court of that state, in its opinion declaring the above quoted section unconstitutional, said:

"The clear effect of these [constitutional] provisions is to place all persons, natural and corporate, as near as practicable upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open handed

to another without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from the equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions. * * *

"The section of the Code under consideration (sec. 1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's fee, not to exceed $20. A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every State Constitution of the various commonwealths of the American government. * *

"The section in question is also violative of that clause in sec. 1, art. IV. [Fourteenth Amendment], of the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction *the equal protection of* its laws.' This guaranty was said by Justice Bradley in *Missouri v. Lewis* (101 U. S., 1 Otto, 22, 30), to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person, or class of persons, should be denied the same protection which is enjoyed by other persons, or other classes, in the same place and under like circumstances.'

"The same court, in *United States v. Cruikshank* (2 Otto, 542, 555) per WAITE, C. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there.'"

St. L., I. M. & S. Ry. v. Williams, 49 Ark., 492-498, involved the constitutionality of an act to provide for appointment of a board to assess damages; and if either party refused to abide by such assessment, and make it necessary for the other to sue, he should be taxed with an attorney's fee in event the judgment of the court was not more favorable than the award. In holding the act invalid the court said:

"The constitution of this state declares * * * that 'Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character; he ought to obtain justice freely, and without purchase, completely and without denial, promptly and without delay, conformably to the laws.' Every one is entitled, under the constitution, to have his rights enforced, his wrongs redressed, and his liabilities determined in the courts, whenever it becomes necessary to compel their enforcement, redress, or adjustment, and when he is liable for damages, as the appellant is in this case, to have the damages he shall pay assessed by a jury. The legislature has no power to substitute boards of arbitration for the courts without the consent of parties, and make their awards obligatory, and the exercise of the right to seek the aid of the courts to obtain relief from a wrong, or impose upon any one a penalty for exercising such right."

In *Jolliffe v. Brown*, 14 Wash., 159, the court used the following language:

"Legislation requiring railroad companies to pay an attorney's fee in case of litigating such claims unsuccess-

fully, where none was imposed upon the plaintiff if unsuccessful, has been sustained in some instances, and generally *upon the ground that it was in the nature of a penalty for failure to perform a duty imposed by statute.* * * *

"It cannot be sustained here as a penalty, for, as has been said, there was no duty to fence imposed by statute. * * * There is a broad distinction to be recognized between legislation requiring a party to pay actual damages occasioned and that which would impose a penalty in addition thereto. Such legislation can be sustained only where the party on whom the penalty is imposed is in fault or guilty of a wrong. Considered as an attorney's fee, purely and simply, it distinguishes between classes of persons, and not as to subjects of litigation or classes of controversies, and by the weight of authority has been held to be unconstitution." Citing *Denver, etc., Ry. Co. v. Outcalt*, 2 Col. App., 395; *St. L., etc., R. Co. v. Williams*, 49 Ark., 492; *S. & N. A. R. Co. v. Morris*, 65 Ala., 193; *Wilder v. Chicago, etc., Ry. Co.*, 70 Mich., 382; *Chicago, etc., R. Co. v. Moss*, 60 Miss., 641.

Grand Rapids Chair Co. v. Runnels, 77 Mich., 104, 111, holds:

"Act No. 147, Laws of 1887, which provides for the taxation of a $5 attorney fee in favor of plaintiff in a suit to recover for personal services, as a part of his costs, is unconstitutional and void."

The above decision is based on the former precedents announced in cases involving attorney's fee assessed against railroads.

Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss., 641-652, involved the constitutionality of an act providing "that whenever an appeal shall be taken from the judgment of any court in an action for damages brought by any citizen of this state against any corporation, a reasonable attorney's fee for the appellee shall be assessed by the court," etc. The court, in an extended opinion, holding the provision to be within the inhibition of the Bill of Rights, declaring "all courts shall be open," etc., said:

"The right of appeal cannot be fettered and clogged with reference to the parties litigant, or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

Denver, etc., Ry. Co. v. Outcalt, 2 Col. App., 406, holds also against the power to impose an attorney's fee against a railway company, except in cases where it is expressly made a penalty for violation of a positive statute.

We have not overlooked the holding in *Fidelity Mut. L. Ass'n v. Mettler*, 22 Sup. Ct. R., 662, decided May 5, 1902, since the suing out of the writ in this case, upholding a law of Texas imposing a penalty on life insurance companies for failure to pay death claims. Like Mr. Justice HARLAN, who dissented from the decision, we find ourselves unable to reconcile that case with the doctrine held in *Ellis's case* (165 U. S., 150). The court in *Mettler's case* ruled that the general business of life insurance is essentially different from that of fire insurance, and upheld the act of Texas as a reasonable and natural classification. The act there in question, however, unlike that of Nebraska, applied generally to all cases of claims under life insurance policies. The rule of classification in that case was not extended, however, to so fine a point that the legislature might discriminate between beneficiaries claiming under identical forms of contract. The present record imposes upon the court the duty of determining whether the rule as to classification can be carried so far as to award special privileges to the *landlord* whose tenement, or realty fixture, is destroyed, while withholding the same privileges from the *tenant* who suffers loss of his goods by the same identical casualty. If the rule be extended to cover the case suggested, then all constitutional checks and safe-

guards against discriminatory and partial legislation will be removed, and the legislature left at liberty to legislate, without restraint, against odious individuals, and the constitutional guaranty of equality will afford no protection whatever.

It is no answer to the constitutional question urged, to say that the plaintiff in error may quit business if unable to stand the exactions imposed. It has its property, securities, appliances, supplies, records, charts, maps, established agencies, and the good will which it took years of industry and watchfulness to acquire and build up. To require its relinquishment now by unjust legislative impositions is confiscation. Such a proposition can not be sustained upon principle. It is the rule of this and other courts that constitutional rights cannot even be lost by assent of the parties. The only means of preserving constitutional rights is for the court to put its restraining hand upon legislative encroachment on individual rights. Considerations of estoppel or of expediency should have no place with the courts when they are called upon to adjudicate constitutional rights. As was well said in *Commonwealth v. Conynghan,* 65 Pa. St., 84, "Were such considerations to prevail, the instrument, in time, would disappear altogether by attrition of repeated encroachments, and its very existence become traditionary." Mr. Justice MATTHEWS, in *Poindexter v. Greenhow,* 114 U. S., 270-308, said:

"Of what avail are written constitutions whose bills of rights, for the security of individual liberty, have been written, too often, in the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that too with the sacred authority of law, not only compelling obedience, but entitled to respect?"

The act in question is "glaring in its obnoxious repug-

nance to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights in every state constitution of the various commonwealths of the American government," and to the equality clause of the fourteenth amendment to the federal constitution. It should, therefore, be adjudged void.

Respectfully submitted,

HALLECK F. ROSE,
Counsel for Plaintiff in Error.

LINCOLN, NEBRASKA, November 21, 1902.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

THE FARMERS & MERCHANTS INSURANCE COMPANY, Plaintiff in Error, vs. FRANK DOBNEY, Defendant in Error.	No. 189. IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

I

Statement of the Case.

This action was brought originally in the County Court of Holt County. From there, an appeal was taken to the District Court of Holt County, Nebraska, and trial had in that Court. The defendant in error recovered a verdict and after a motion for a new trial was over-ruled, judgment was entered on the verdict for the amount due and costs.

The Court by interlocutory order, ordered an attorney's fee of $150.00 taxed as part of the costs. This was, understand, clearly an interlocutory order and after the entry of this order the final judgment was rendered. This is an important fact to keep in mind, because we think it entirely disposes of the contention of the plaintiff in error.

II

The examination of the pleadings in the County Court, will show that no question was raised by the Insurance Company in that Court as to the validity of the Nebraska statutes, authorizing the taxation of an attorney's fee on certain iusurance contracts. By the Nebraska law if this question was not raised by the pleading in the County Court, it could never afterwards be raised in any higher Court. Unless it was raised in the County Court, it was waived and it could not be then plead in District Court on appeal. It may be proper to suggest here that on appeal from the County Court to the District Court, in Nebraska, there is a trial DE NOVO. But the case must be tried in the District Court upon the issues presented in the County Court. This is a well settled law of the state.

Bishop vs. Stevens, 31 Neb. 786.
O'Leary vs. Iskey, 12 Neb., 136.
Sawyer vs. Brown, 17 Neb: 171.
Railway Co. vs. Oglvy, 18 Neb. 638.
Ball vs. Beaumont, 59 Neb. 631.

III

In the trial in the District Court the constitutionality of the Nebraska statutes, was not drawn in question. No suggestion was made about the statute violating the equality clause of the fourteenth amendment to the Federal constitution. The interlocutory order made by the trial Court was made without objection by the Insurance Company and without any exception thereto. It is a settled law of Nebraska that unless the attention of the trial Court was called to it the question could not be raised for the first time in the Supreme Court.

Dunhan. vs. Courtnay, 24 Neb. 629.

Dayton vs. Sloan, 49 Neb. 622.

Hyde vs. Hyde, 60 Neb. 502.

Railway Co. vs. O'Neill, 58 Neb. 239.

Broadwater vs. Foxworthy, 57 Neb. 406.

U. P. R. R. Co. vs. James, 163, U. S. 485.

Backus vs. Fort Street Union Depot Co. 169 U. S. 557.

IV

No exception having been saved to the interlocutory order, directing taxation of the attorney's fees as costs the question could not be reviewed in Nebraska by the Supreme Court. The order having been made without objection or exception on the part of the Insurance Company the order must therefore stand.

Reynolds vs. State, 58 Neb. 49.

Tuomey vs. Wellman, 43 Neb. 28.

Lowrie vs. France, 7 Neb. 191.
Murry vs. School Dist., 11 Neb. 438.
Hosford vs. Stone, 6 Neb. 378.
Morgan vs. State, 51 Neb. 672.

V

We do not wish the Court to misunderstand the condition of this record. The Supreme Court of Nebraska never rendered any opinion in this case. In the Supreme Court for the first time the Insurance Company by its petition in error, assailed the statute now drawn in question. We have pointed out to your Honors that this was entirely too late. Owing to the great increase of business of the Court the legislature of Nebraska two years ago authorized the appointment of nine commissioners who render services similar to referees. Some of their opinions are reported and some are not. The opinion relied on herein was written by one of the commissioners. All that the Court did was to affirm the judgment. Not a word was said about the interlocutory order. It is true that the commissioner or referee in his opinion refers to it but does not say whether he refers to it with reference to State constitution or Feberal constitution. The petition in error assailed the statute as being contrary to both the State and Federal constitution. If the opinion of the Supreme Court of Nebraska was desired on this question it might have been had by a motion for rehearing according to our practice if the Court considered that the Federal

question was in the case. But, your Honors can clearly see that the Insurance Company having waived the question in the County Court and in the District Court and having assented without objection to the order taxing the attorney's fee, could not raise that question in the Supreme Court and there was no Federal question in the case to be disposed of. It has been held by this Court that an order of the judge of a State Court at Chambers can not be regarded as an order of the Court; McKnight vs. James, 155 U. S. 685. The commissioner who wrote the opinion in the question was not even a judge. These commissioners can make no order of any kind. They are simply assistants to the judges and are entirely shorn of all judicial power.

In so far as any supposed variance between the statute in question, and the constitution of Nebraska is concerned, it is an elementary rule that the construction placed by the Supreme Court of Nebraska upon the Nebraska Constitution is binding, and the determination of the Nebraska Court is not subject to re-examination here. Then the opinion of Commissioner Day, says on the subject: "A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional and to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one in this state. The precise question has been decided by this Court and many of the authorities cited in the brief of defendant were considered and reviewed by the court."

We submit that this reference to the constitution must be construed as a reference to the Nebraska constitution alone and not the fourteenth amendment to the Federal constitution.

Kipley vs. Illinois, 170 U. S. 182.

Miller vs. Railroad Company, 168 U. S. 131.

VI.

We submit that on the record here the Insurance Company having waived all objections to this statute in the County Court and in the District Court and having assented to the taxation of an attorney's fee in the District Court and having never raised it until it was raised by the petition in error in the Supreme Court and the question being no where raised by pleading, the Supreme Court of Nebraska on this condition of the record was without jurisdiction to determine the question, the question, was raised too late here.

Railroad Co. vs. Purdy, 185 U. S. 148.

Re Buchanan, 158, U. S. 31.

We are not unmindful of the decision of this Court in Sully vs. American National Bank, 178 U. S. 289. But we think that the case has no application whatever here. In that case the Supreme Court of Tennessee, hearing the case on appeal had authority to modify the decree and pursuant to that authority it did modify the decree of the Court of Chancery; heard the case DE NOVO and disposed of the entire question upon its merits. In Nebraska in an equity action a similar decree may be rendered by our Supreme Court, but it is not so in actions at law. Therefore the Supreme Court of Nebraska would

have no authority to interfere with the judgment of the trial Court in a law action. The error complained of must first have been called to the attention of the trial Court. If this is not done the Supreme Court of Nebraska is powerless to remedy the error. And if the Supreme Court of Nebraska was absolutely without authority to interfere with, or modify the order of the trial Court in taxing this attorney's fee, then this court surely has no such jurisdiction. In the Sully case the constitutionality of the statute was necessarily involved upon the record; the Supreme Court of Tennessee in disposing of the case had to dispose of it on its merits, and in so disposing of it on its merits that Court was called upon in the exercise of its constitutional powers to determine the validity of the Tennessee statute. In the case at bar the Supreme Court of Nebraska was not called upon on the ecord to determine the validity of the Nebraska statute, and what is more the Supreme Court of Nebraska had no constitutional power to determine the question. When the parties by their pleading waived it and thereby settled it themselves, and when the trial Court without protest from either litigant taxed this attorney's fee, its judgment was final and not subject to review.

VII

But if the Nebraska statute authorizing the taxation of an attorney's fee on certain insurance contracts needed defence, we think it may well be defended. The statute drawn in question is as follows; section 43: "Whenever any policy of

insurance shall be written to insure any real property in this state, against loss by fire,tornado or lightening and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

Section 44. This act will apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

Section 45. The Court upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs."

The provisions of the statute quoted are part of chapter forty three, that being the chapter of the Nebraska statutes dealing generally with Insurance Companies. It is recognized in Nebraska as elsewhere that insurance corporations are creatures of the law. The power that creates them has the power to regulate them and define their liabilities. The legislature could prohibit them absolutely from doing business in the state

and having the power to prohibit absolutely, the legislature clearly has the power to prescribe the conditions under which an Insurance Company may transact business. The plaintiff in error is a Nebraska corporation and whatever right to do business it possesses it has acquired under the very laws whose validity it now challenges. The statute in question was not by its terms retroactive. It was made to apply only to future policies. This law became a part of the contract in other policies of insurance thereafter issued. That the legislature may prescribe the conditions under which an insurance corporation may do business within a state has been recognized by this court.

Fidelity Mutual Life Association vs. Metler, 185 U. S. 316.

Waters—Pierce Oil Co. vs. Texas 177 U. S. 42.

New York Life Insurance Co. vs. Cravens, 178 U. S. 395.

We rather think that counsel for plaintiff in error, confuses the terms "citizen" and "person" as used in the fourteenth amendment to the Federal constitution. This court has held in several cases that the term "person" includes a corporation. But it is likewise held that the term "citizen," does not include a corporation.

Orient Insurance Co. vs. Daggs, 172 U. S. 557.

Blake vs. McClung, 172 U. S. 239.

Paul vs. Virginia, 8 Wall 168.

The plaintiff in error not being a citizen, within the meaning of the fourteenth amendment to

the constitution of the United States can claim no exemption, privilege, or immunity under that amendment. When it became a corporation it subjected itself to the different provisions and liabilities of the Nebraska statutes. It has subjected itself not only to the provisions of the statute in question, but also to the provisions of the following sections in the same chapter.

SECTION 1. That hereafter, when any number of persons associate themselves togather for the purpose of forming an insurance company, for any other purpose than life insurance, under the provisions of chapter twenty-five of the Revision of 1866, and all acts amendatory and suplementary thereto, they shall publish a notice of such intention once in each week, for four weeks, in some public newspaper in the county in which such insurance company is proposed to be located; and they shall also make a certificate under their hands, specifying the name assumed by such company and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company shall be located, which certificate shall be acknowledged before and certified by some notary public, or clerk of court of record, and forwarded to the auditor of state, who shall submit the same to the attorney-general of state for examination, and if it shall be found by the attorney-general of state to be in accordance with the provisions of this act, and not in conflict with the constitution and laws of the United States and of this state, he shall make certificate of the facts and return it to the auditor of state, who shall reject the name or title applied for by any company when he shall deem the same too similar to any one already appropriated by any other company, or likely to mislead the public. (G. S., 429)

SECTION 2. When the said certificate of the said company shall have received the approval of the attorney of state and auditor of state, the said company shall cause the same to be recorded as now required by law for recording articles of incorporations; and said persons, when incorporated, and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance, as named in such certificate of incorporation, and by the name and style provided therein, and shall be deemed a body corporate with succession, they and their associates, successors, and assigns, to have the same general corporate powers and be subject to all the obligations and restrictions of said chapter twenty-five of revision of 1860, and of such acts as may be amendatory or supplementary, except as may be herein otherwise provided.

SECTION 3. No joint-stock company shall be incorporated under the provision of this act with a smaller capital than one hundred thousand dollars, nor more than one million dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital at least fifty per cent. shall be fully paid up in cash, and that for the remainder of its capital there are in its possession notes of its stockholders, secured by at least one surety or by mortgages on unincumbered real estate, within this state, worth at least twice the amount of such notes, which notes or other security shall be approved by the state auditor; nor shall any company on the plan of mutual insurance commence business in this state until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars of which at least five thousand dollars shall have been paid in actual cash and for the remainder of which notes of solvent parties,

parties founded upon actual and *bona fide* applications for insurance, shall have been received; no one of the notes received as aforesaid shall amount to more than five hundred dollars, and no two thereof shall be given for the same risk or made by the same person or firm, except where the whole amount of such notes does not exceed the sum of five hundred dollars; nor shall any note be regarded or represented as capital stock, unless a policy be issued upon the same within thirty days after the organization of the company taking the same, upon a risk which shall be for no shorter period than 12 months; each of said notes shall be payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expenses as may be necessary for transacting the business of said company; and no notes shall be accepted as part of such capital stock unless the same shall be accompanied by a certificate of a justice of the peace, notary public, or clerk of the district court of the county in which the person excuting such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same, in property not exempt from execution by the laws of their state; and no such note shall be surrendered while the policy for which it was given continues in force.

SECTION 6. It shall be lawful for any insurance company organized under the act, or incorporated under any law of this state, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages or unincumbered real estate, within the state of Nebraska, worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company or companies and the policy or policies transfered to said company, and also in stocks of this state or stocks or

treasury notes of the United States, in the stocks and bonds of any county or incorporated city in this state, which may have been therefore authorized to be issued by the legislature of this state, and to lend the same, or any part thereof on the security of such stock, or lands, or treasury notes, or upon bonds and mortgages as aforesaid, and not otherwise; and to change and reinvest the same in like securities, as occasion may from time to time require; but any surplus money over and above the paid up capital stock of any such company organized under this act or incorporated under any law of this state may be invested in or loaned upon the pledge of public stocks, or bonds of the United States or of any one of the states, or stocks, bonds, or evidences of indebtedness of any solvent, dividend-paying institution incorporated under the laws of this state, or of the United States, except their own stock; *Provided Always*. That the current market value of such stock, bonds. or other evidence of indebtedness shall be at all times, during the continuance of such laws, at least twenty per cent. more than the sum loaned thereon.

SECTION 7. Upon receiving notification that the requirements of the preceding sections have been complied with, the auditor of state shall make an examination, or cause one to be made by some disinterested person officially appointed by him for that purpose, and if it shall be found (if the examination shall be made other than (by) the auditor, then the finding shall be certified under oath) that the capital herein required of the company named, according to the nature of the business proposed to be transacted by such company, has been paid in and possessed by it in money, or in such stocks, notes, bonds, or mortgages as are required by the third and sixth sections of this act, then he shall so certify; and if the examination be made by other than the auditor, then the finding shall be certified under oath; or, if

it is proposed to be a mutual insurance company, that it has received and is in possession of the capital, premiums, or *bona-fide* engagements of insurance, or the securities, as the case may be, to the extent and value required by the third and sixth sections of this act, the name and residence of the maker of each premium note forming part of the capital of any such proposed mutual insurance company, and the amount of such note shall be returned to the auditor. The corporators or officers of such company or proposed company contemplated by this act shall be required to certify under oath, to the auditor of state, that the capital exhibited to the person making the examination directed in this section was *bona-fide* property of the company so examined; the certificates above contemplated shall be filed in the office of said auditor, who shall thereupon deliver to such company a certified copy of the same, with his written permission for them to commence business as proposed in their written certificate of incorporation, which, on being placed on record in the office of the recorder of the county in which the company is to be located, by the recorder, in a book prepared by him for that purpose, shall be their authority to commence business and issue policies; and such certified copy of said certificate may be used in evidence for or against said company with the same effect as the originals.

SECTION 8. It shall be lawful for any company organized under this act, or doing business in this state: *First*—To insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel afloat, wherever the same may be. *Second*—To make insurance on the health of individuals, and against the personal injury, disablement, and death, resulting from traveling or general accidents by land or water. *Third*—To guarantee or

insure the fidelity of persons holding places of public and private trust and to become surety on bonds and obligations of persons and corporations and to become surety on any bond, recognizance, or other writing in the nature of a bond in the same manner that natural persons may do so, subject to all the rights and liabilities of such persons. *Fourth*—To receive on deposit and insure the safe keeping of books, papers, monies, stocks, bonds, and all kinds of personal property. *Fifth*—To insure horses, cattle, and other stock against loss or damage by accident, theft, or any unknown or contingent event whatever which may be the subject of legal insurance; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business and upon the interest which it may have in any property by means of any loan or loans which it may have made on mortgage, bottomry, or respondentia; and generally to do and perform all other matters and things proper to promote these objects; *Provided*. That no companies shall be organized to issue policies of insurance for more than one of the above five mentioned purposes; and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this act, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. on its paid-up capital, unless the excess shall be re-insured by the same in some other good and reliable company; *And Provided*, That the restriction as to the amount of risk any company shall assume shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and gurantee the safe keeping of books, papers, moneys, and other property. (Amended 1901, chap. 39)

SECTION 12. All policies of contracts of insurance made or entered into by the company may be made either with or without the seal of said company; but said policies shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary thereof.

SECTION 15. It shall not be lawful for the directors, trustees, or managers of any insurance company organized under this act, or incorporated under any law of this state to make any dividends except from the surplus profit arising from their business, and in estimating such profits there shall be reserved refrom a sum equal to forty per cent. of the amount received as premiums on unexpired risks and policies, which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved all sums due the corporation on bonds and mortgages, bonds, stocks, and book accounts of which no part of the principal or interest thereon has been paid duing the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and in case of such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved. Any dividends made contrary to these provisions shall subject the company making it to a forfeiture of their charter.

SECTION 19. Every insurance company hereinafter organized as provided in this act, shall,if it be a mutual company, embody the word "mutual" in its title, which shall appear upon the first page of every policy, and renewal receipt; and every company doing business as a cash stock company, shall, upon the face of its policies, express in some suitable manner that such policies were issued by stock companies.

SECTION 20. It shall be the duty of the president or of the vice-president and secretary of each company organized under this act, or incorporated under any law of this state, or doing business in this state, annually, on the first day of January of each year, or within thirty days thereafter, to prepare under oath and deposit in the office of the auditor of state, a full, true, and complete statement of the condition of such company on the last day of the month preceding that in which such statement is filed, which last statement shall exhibit the following items and facts in the following form, viz: *First.* The amount of capital stock of the company. *Second.* The name of the officers. *Third.* The name of the company, and where located. *Fourth* The amount of capital stock paid up. *Fifth.* The property or assets held by the company specifying the value as near as may be of the real estate owned by such company. The amount of cash on hand and deposited in banks to the credit of the company, and in what bank the same is deposited. The amount of cash in the hands of agents, and in course of transmission. The amount of loans secured by first mortgages on real estate, with the rate of interest thereon, specifying the location of such real estate, and its assessed valuation. The amount of other bonds and loans, and how secured with the rate of interest thereon. The amount due the company on which judgment has been obtained. The amount of stocks of this state, of the United States, of any incorporated city of this state, and of any other stock owned by the company, specifying the amount, numbers of shares, and par and market value of each kind of stock. The amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value. The amount of assessments on stock and premium notes paid and unpaid. The amount of interest actually due and unpaid. All other securities and their value. The

amount for which premium notes have been given, on which policies have been issued. *Sixth.* The liabilities of such company, specifying the losses adjusted and due. Losses adjusted and not due. Losses unadjusted. Losses in suspense, and the cause thereof. Losses resisted and in litigation. Dividends either in script or cash specifying the amount of each declared, but not due. Dividends declared and due. The amount required to reinsure all outstanding risks on the basis of forty per cent. of the premium on all unexpired risks. The amount due banks or other creditors. The amount of money borrowed and the securities therefor. All other claims against the company. *Seventh*—The income of the company during the previous year, specifying the amount received for premiums exclusive of premium notes; the amount of premium notes received; the amount received for interest; the amount received for assessment calls on stock or notes, or premium notes. The amount received from all other sources. *Eighth*—The expenditures during the preceding year, specifying the amount of losses paid during said term, stating how much of the same accured prior and how much subsevuent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement. The amount paid for dividends. The amount paid commissions, salaries, expenses, and other charges of agents, clerks, and other employees. The amount paid for salaries, fees, and other charges of officers and directors. The amount paid for local, state national internal revenue, and other taxes and duties. The amount paid for all other expenses, expenditures, including printing, stationery, rents, furniture, etc. *Ninth*—The largest amount insured in any one risk. *Tenth*—The amount of risks written during the year then ending. *Eleventh*—The amount of risks in force having less than one year to run. *Twelfth*—The amount of risks in

force having more than one and not over three years to run. *Thirteenth*—The amount af risks having more than three years to run. *Fourteenth*—The following question must by answered, viz: Are dividends declared on premiums received for risks not terminated? The auditor of state shall withhold the certificate of authority from any such company neglecting or failing to comply with the provisions of this section.

SECTION 21. The auditor of state is hereby authorized and empowered to address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions which he may deem necessary for the public good, or for a proper discharge of his duties; and it shall be the duty of any company so addressed to promptly reply in writing there to.

SECTION 24. It shall not be lawful for any agent or agents or individual to act for any insurance company or companies referred to in this act, directly or indirectly, in taking risks or transacting business of insurance in this state, without procuring from the auditor of state a certificate of authority stating that such company has complied with all the requisitions of this act.

SECTION 26. Every insurance company organized under the laws of or doing business in this state shall conform to all the provisions of this act, applicable there to, on or before the first day of April 1873; and when necessary, any existing company shall change its charter and by-laws so as to conform hereto, by a vote of a majority of its board of directors, and any president, secretary, or other officer of any company organized under the laws of Nebraska, or any officer or person doing or attempting to do business in this state for any insurance company organized without this state, failing to comply with any of the requirements of this act, or violating any

of the provisions thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars and be imprisoned in the county jail for a period of not less than thirty days, nor more than six months.

SECTION 28. It shall be the duty of the auditor of state, whenever he shall deem it expedient so to do, in his judgment, to appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in this state, to examine into the affairs and condition of any insurance company incorporated or doing business in this state, or to make such examination himself; and it shall be the duty of the officers or agents of such company or companies to cause their books to be open for the inspection of the auditor or the person or persons so appointed, and otherwise facilitate such examination so far as may be in their power to do; and for the purpose of arriving at the truth in such cases, the auditor, or the persons so appointed by him, shall have power to examine, under oath, the officers or agents of any company or others, if necessary, relative to the business and condition of said company; and whenever the auditor shall deem it best for the interest of the public so to do, he shall publish the result of such investigation in one or more papers of this state; and whenever it shall appear to the said auditor, from such examination, that the assets and funds of any company incorporated in this state are reduced or impaired by the liabilities of said company, as described under the head of liabilities in the statement required by this act, more than twenty per cent. below the paid up capital stock required by this act, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition; or he shall communicate the fact to the attorney of state, whose duty it shall then become to ap-

ply to the district court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed, and the court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court or judge that the assets and funds of said company are not sufficient as aforesaid, or that the interests of the public require it, the said court or judge shall decree a dissolution of said company, and a distribution of its effects; the said court or judge shall have power to refer the application of the attorney of state to a referee, to inquire into and report upon the facts stated herein.

SECTION 29. Any company receiving the aforesaid requisition from the said auditor shall forthwith call upon its stockholders for such amounts as will make its paid up capital equal to the amount filed by this act or the charter of said company; and in case any stockholder shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as said auditor shall approve, it shall be lawful for the said company to require the return of the original certificates of stock held by such stockholder, and in lieu thereof, to issue new certificates for such number of shares as the said stockholder may be entitled to, in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company, the value of such shares for which new certificates shall be issued to be ascertained under the direction of the said auditor, the company paying for the fractional parts of shares. And it shall be lawful for the directors of such company to create new stock, and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company

and in the event of any additional losses, accruing upon new risks taken on the expiration of the period limited by the said auditor, in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said degciency shall have been made up, the directors shall be individually liable to the extent thereof.

SECTION. 34. It shall be the duty of every insurance company of the kind provided in this act, doing business in this state, organized under the laws of this state or any other state or country, to publish once, annually, in two newspapers of general circulation, one of which newspapers shall be published at the capital of the state (and in case of companies organized in the state of Nebraska, one of which shall be published in the county where the principal office is located,) a certificate from the auditor of state that such company has in all respects complied with the laws of this stase relating to insurance.

The experience of the people of Nebraska with Insurance Companies was such as to lead the legislature to believe that the adoption of the statute drawn in question was necessary. It was made to apply only to insurance upon buildings. The prime object was to protect the health and welfare of the people. The case at bar may be used to illustrate the wisdom and necessity of such a law. The building destroyed and insured was the dwelling house of the defendant in error and his family, payment was resisted upon grounds entirely unjustifiable. The plaintiff in error refused to pay the loss and Mr. Dobney was a man of but small means in a newly settled and sparcely settled prairie country. His home was destroyed and he was without money

to rebuild. He and his family had to tent it out or do the best they could until some means could be secured to build some kind of a home that might be a shelter for his family. If the money could be immediately procured a home might be promptly built, but if settlement was delayed the family might be exposed to hardships and for a lack of a comfortable home their health or even their lives might be endangered. A large portion of Nebraska has very few tenement houses. A man must own his own house or do without. If he is burned out he can not rent a house in the neighborhood, but has to live in a tent or barn or a "dug out." By living in this way he or his family may contract disease, and it is within the power of the legislature by all reasonable legislation to protect the health of the people against disease and suffering. The hardship and suffering endured by defendant in error and his family by reason of the failure of the plaintiff in error to pay this loss is in itself a forcible argument in favor of the wisdom of the statute. The reasons for the adoption of this statute are certainly as strong as the reasons advanced by this Court for sustaining the Texas statute, in Fidelity Mutual Life Association vs. Mettler, Supra. The decision in that case to the mind of the writer is conclusive in this. We think the doctrine of that case is eminently sound and the reasoning unanswerable.

The right of the Nebraska Legislature to en-

act the statute in question is fully recognized, by implication at least, by this court in the following cases:

Insurance Company vs. Warren, 181, U. S. 73.

Orient Insurance Company vs. Daggs, 172 U. S. 557.

Railroad Company vs. Mathews, 174 U. S. 96.

Respectfully submitted,

M. P. KINKAID,

M. F. HARRINGTON,

Attorneys for Defendants in Error.

O'Neill, Nebraska,

February 25, 1903.

Supreme Court of the United States.

No. 189.—October Term, 1902.

The Farmers' and Merchants' Insurance Company, Plaintiff in Error, vs. Frank Dobney. } In error to the Supreme Court of the State of Nebraska.

[April 6, 1903.]

Mr. Justice White delivered the opinion of the Court.

Having been adjudged to pay the amount of a fire policy written on the dwelling house of the defendant in error, which was totally destroyed by fire, the plaintiff in error prosecutes this writ. The judgment was for $861.40 with interest, costs, and $150 as a reasonable attorney's fee. This latter amount was fixed under authority conferred on the court by sections 43, 44 and 45 of chapter 43 of the Compiled Statutes of Nebraska, which are a reproduction of chapter 48 of the laws of Nebraska for 1899. The sections in question are reproduced in the margin.* The allowance of the attorney's fee is the basis of the Federal right asserted. It is moved to dismiss the writ on the ground that the Federal right was not specially set up below as required by Rev. Stat. 709, or was in any event alleged too late to enable the Supreme Court of Nebraska to consider it. Among the assignments of error contained in the petition in error filed before the hearing in the Supreme Court of Nebraska was the following:

---

*Compiled Statutes of Nebraska, chapter 43.

Sec. 43. Whenever any policy of insurance shall be written to insure any real property in this State, against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

Sec. 44. This act shall apply to all polices of insurance hereafter made or written upon real property in this State, and also to the renewal, which shall hereafter be made, of all policies heretobefore written in this State, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this State.

Sec. 45. The court, upon rendering judgement against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs.

"Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney fee to be taxed, is unconstitutional and void for want of mutuality of the provisions and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States, and in conflict with section 3 of article 1 and section 15 of article 3 of the constitution of Nebraska."

The case was considered by commissioners appointed pursuant to the Nebraska law to aid the Supreme Court of the State in the discharge of its duties. The commission in an elaborate opinion recommended the affirmance of the judgment. In such opinion the assignment of error concerning the attorney's fee, above quoted, was considered and numerous cases decided by the Supreme Court of Nebraska sustaining its allowance under the statute in question were referred to. It was said in the opinion that the legality of the attorney's fee "was not an open question in this State" because the right to allow the fee had been previously sustained by the Supreme Court of the State in many cases. A passage from the case of *Lancashire Insurance Company* v. *Bush*, (60 Neb. 116,) expressly declaring that the statute concerning the allowance of the attorney's fee was consistent both with the Constitution of the United States and of the State of Nebraska, was approvingly cited, the passage in question being as follows:

"These decisions are vigorously attacked, but we are convinced, as a result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the Constitution of the United State or of this State which forbids classification of subjects for the purpose of legislation."

The Supreme Court of Nebraska, for the reasons stated in the report of the commission, affirmed the judgment. It results that not only was the Federal question relied upon specially called to the attention of the Supreme Court of the State of Nebraska, but it was by that court expressly decided. The grounds upon which the motion to dismiss is predicated are, therefore, without merit, and it is overruled.

All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsucessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the Fourteenth Amendment, are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; second, because whilst the obligation to pay attorney's fee is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insur-

ance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance as between themselves may not be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court. (*Orient Insurance Company* v. *Daggs*, 172 U. S. 552; *Insurance Company* v. *Warren*, 181 U. S. 73; *Insurance Company* v. *Mettler*, 185 U. S. 308.) In the Orient case, a statute of the State of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, not only on the ground of the right of the State to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the Warren case a like principle was applied to a statute of the State of Ohio establishing a particular regulation as to life insurance companies. In the Mettler case a statute of the State of Texas was sustained, applicable alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of twelve per cent damages after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts or to authorize a classification of insurance contracts so as to subject one character of such contracts when put in one class to one rule and other varieties of such contracts when placed in another class to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss. This it is elaborately argued takes this case out of the rule established by the previous cases and causes the statute to be repugnant to the Fourteenth Amendment. But as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for sub-classification.

It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured and not permit recovery of such fee when the property insured has been only partially destroyed? The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the State. If in regulating and classifying insurance contracts the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason.

Affirmed.

Mr. Justice HARLAN, Mr. Justice BREWER and Mr. Justice BROWN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.